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# Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 340.

EDWIN F. HALE,
*Appellant,*

vs.

WILLIAM HENKEL, United States Marshal in and for the Southern District of New York.

## BRIEF FOR THE UNITED STATES.


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# In the Supreme Court of the United States.

OCTOBER TERM, 1905.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

EDWIN F. HALE,
Appellant,

vs.

WILLIAM HENKEL, United States Marshal in and for the Southern District of New York.

No. 340.

## BRIEF FOR THE UNITED STATES.

This is an appeal from a final order of the Circuit Court of the United States for the Southern District of New York made herein on the 10th day of June, 1905, discharging a writ of *habeas corpus* obtained by the appellant (fols. 60, 61).

On the 5th day of May, 1905, the Grand Jury of the Circuit Court for the Southern District of New York presented to the HON. E. HENRY LACOMBE, Circuit Judge, charges of contempt against the appellant herein for his refusal on May 2, 1905, to answer certain questions and produce certain documentary evidence material to an investigation then being conducted by the said Grand Jury. These charges set out the service of a subpœna *duces tecum* upon the appellant requiring him to attend and to produce certain books and papers mentioned therein, his appearance before the Grand Jury and his refusal

either to testify or to produce the documentary evidence called for (fols. 14–18). A copy of the minutes of the proceedings of the Grand Jury at the session at which the appellant attended was attached to the charges (fols. 18, 23).

The charges of May 5 were presented by the Grand Jury in open court in the presence of the witness, who was attended by counsel. The Court forthwith made an order directing the witness to answer the questions propounded to him and produce the papers called for by the subpœna (fols. 30–33). The Grand Jury, through the Assistant District Attorney, then resumed the examination of the appellant, who again refused to answer the questions or produce the documents (fols. 33–39). Thereupon he was adjudged by the Court to be in contempt and was committed to the custody of the Marshal until he should comply with the order of the Court (fols. 10–13).

Upon a petition setting forth the above facts and the grounds more particularly set forth below the appellant obtained a writ of *habeas corpus* (fols. 1–9, 39–40). Upon the return of the writ a hearing was had before Hon. WILLIAM J. WALLACE, and after the matter had been fully argued by counsel and considered by the Court the writ was discharged (fol. 61). Judge WALLACE wrote an opinion, which appears at page 16 of the record.

Most of the questions asked of the appellant were preliminary. Some related to the business of the MacAndrews & Forbes Company, its officers, its place of business, its relation to The American Tobacco Company and other companies (fol. 33 *et seq.*). One question indicating the general line of inquiry was the following:

> "Is there any agreement, or understanding, or ar-
> " rangement, between The American Tobacco Company
> " and MacAndrews & Forbes Company in relation to
> " the trade or business in licorice, licorice paste or
> " licorice mass, affecting that business between several
> " States of the United States?" (fol. 35).

The subpœna *duces tecum* called for the production of a number of contracts, agreements, letters, reports and accounts which were specified in a general way, without specific reference to dates, but indicating certain corporations and firms

with which the papers called for were in some way connected (fols. 24–27).

At the outset the witness presented a paper from which he read as follows:

> " Before being sworn, I respectfully ask to be advised " of the nature and purpose of the investigation in " which I have been summoned here, whether it is " under any statute of the United States, and the spe- " cific charge, if any has been made, in order that I may " learn whether or not the Grand Jury has any lawful " right or authority to make the inquiry, and whether there is anything lawfully pending here upon which " witnesses may be summoned, sworn and examined; " and I also ask that I be furnished with a copy of the " complaint, information or proposed bill of indictment, " if any, upon which you are acting, in order that I may " know concerning what transactions, matters or things " I am called upon to testify or produce evidence. My " subpœna requires me to attend and testify and give " evidence in a certain action now pending and unde- " termined in the Circuit Court of the United States " for the Southern District of New York between the " United States of America and The American Tobacco " Company and MacAndrews & Forbes Com- " pany, on the part of the United States, " and to produce various papers and doc- " uments. I am informed that there is no action " now pending in the Circuit Court between the Gov- " ernment and the corporations named, and the vague " and general description of the papers and documents " leads me to suppose that the Grand Jury is investi- " gating no specific charge against any one. If that is " the fact, my counsel advise me that I ought not to " obey the summons or submit to examination " (fols. 35, 36).

He also declined to answer the questions on these further grounds:

" First, that there is no legal warrant or authority for my " examination as a witness, and, second, that my answersmay " tend to criminate me " (fol. 19).

His refusal to produce the papers asked for in the subpœna *duces tecum* he stated to be on the following grounds:

"First, because it would have been a physical impossibil-
"ity for me to have gotten them together within the time al-
"lowed, and second, because I am advised by counsel that
"upon the facts as they now appear, I am under no legal obli-
"gation to produce anything called for by the subpœna, and,
"third, because they may tend to criminate me" (fol. 20).

These grounds were repeated several times at the first hearing before the Grand Jury on May 2d and were referred to at the last hearing on May 5th, as the grounds for the refusal of the witness to obey the order of Judge LACOMBE (fols. 19-22).

The Assistant District Attorney at the first hearing, and in substantially the same words at the next hearing, in the presence of the Grand Jury, addressed the petitioner as follows:

> "Mr. Hale, I desire to advise you that this is a pro-
> "ceeding under the so-called Sherman Act, being an
> "act to protect trade and commerce against unlawful
> "restraints and monopolies, 26 Statutes, 209, 1 Supple-
> "ment Revised Statutes, 762 and following, and the
> "acts amendatory thereof and supplementary thereto,
> "and particularly Chapter 755 of the laws of 1903,
> "approved February 25, 1903, and I also advise you
> "that under the last-named Act, no person shall be
> "prosecuted or be subject to any penalty or forfeiture
> "for or on account of any transaction, matter or thing
> "concerning which he may testify or produce evidence
> "documentary or otherwise, in any proceeding, suit
> "or prosecution under the said Act. That
> "is, referring to the Sherman Act, under
> "which this prosecution is brought: provided,
> "however, that no person so testifying shall be ex-
> "empt from prosecution or punishment for perjury
> "committed in so testifying. And I also advise you
> "that it is the purpose not to proceed to prosecute
> "you, or subject you to any penalty or forfeiture on
> "account of anything that you are now asked to testify
> "to or produce evidence documentary or otherwise re-
> "garding it, in this proceeding, and I offer you and

" assure to you immunity and exemption for any such
" testimony that you may give. Do you still decline to
" answer the questions which have been put to you?
" A. I must respectfully decline to answer."

The petition for the writ of *habeas corpus* set out the grounds on which it was claimed that the detention of the petitioner was unlawful (fol. 2-9). These grounds are also set out with somewhat more elaboration in the assignment of errors (fol. 71-77). Without attempting to repeat them in detail and only for the general information of the Court at this time we summarize them as follows :

1. That the Court is without jurisdiction to entertain a charge of contempt against the petitioner or to act or proceed in any manner in the premises.

2. That when the petitioner was examined, there was no cause or action pending in the Circuit Court between the United States and the corporations named in the subpœna *duces tecum* or between any other parties, in which the petitioner could be required to give evidence.

3. That the Grand Jury was without jurisdiction because under the Constitution of the United States it could only investigate "specific charges against particular persons."

4. That the legislative, executive and judicial appropriation act, approved February 25th, 1903, granting immunity to witnesses testifying in a proceeding, suit or prosecution under the Anti-Trust Law did not apply to the appellant, particularly because the hearing before the Grand Jury was not, within the meaning of the Anti-Trust Law "such proceeding, suit or prosecution," and that, therefore, the appellant was privileged under the Fifth Amendment to the Constitution from giving oral testimony or producing documentary evidence which might tend to incriminate him.

5. That the said Act of February 25th, 1903, is unconstitutional and void in that it undertakes in effect to grant pardons to persons who have been concerned in matters constituting

violations of the laws of the United States and is, therefore, in violation of Section 2 of Article 2 of the Constitution.

6. That the Act of February 25th, 1903, is unconstitutional and void because it seeks to set aside the power of the several States to prosecute and punish and grant or withhold pardons on account of offenses against their laws, thus usurping the power expressly reserved to the several States by the Tenth Amendment to the Constitution.

7. That the above statute of February 25th, 1903, contained no requirement that a person should testify, but only granted to him indemnity in case he elected to testify.

8. That the result of the compulsory production of the papers and documents mentioned in the subpœna *duces tecum* would be in effect an unreasonable search therefor and seizure thereof in violation of the appellant's rights and also of the rights of the MacAndrews and Forbes Company, the owner of such papers and documents which were in the appellant's custody solely as an officer of that Company, under the provisions of the Fourth Amendment to the Constitution.

All of the objections to the detention of the appellant will be fully considered in the following points.

## FIRST. As to the procedure before the Grand Jury.

It is broadly contended by counsel for the appellant that a Grand Jury in this country has no power except (1) to consider and act upon indictments previously framed and laid before them by a known prosecutor, and (2) to present facts within the personal knowledge of the members of the Grand Jury or some of them. It is argued that the Grand Jury was continued as one of the institutions of the Federal Government by the Fifth Amendment of the Constitution which went into force December 15th, 1791, providing that "No person shall be held to answer for a capital or other "infamous crime unless on a presentment or indictment of a "grand jury * * *"; that the common law of England in

relation to grand juries was then in force; that the Grand Jury referred to in the Amendment was intended to be a body vested with only such powers as the same body possessed under the common law of England which are those just mentioned; and that if Federal grand juries in this country have exercised more extensive powers they have acted contrary to the common law and without regard to the limitations placed upon them by the Constitution.

Upon these broad propositions we take issue, and shall endeavor to show that the procedure of a Grand Jury in this country at the time of the enactment of the Fifth Amendment was and, with unimportant exceptions, has remained quite different from that of the similar body in England; that under this procedure the Grand Jury proceeds, before a bill of indictment is framed, to investigate, at the instance of the Court or of their own body or of the District Attorney, a suspected or alleged crime and to determine *whether* it has been committed, and, if so, *who* committed it; that in so doing they exercise broad inquisitorial powers; that the administration of the criminal law in this country necessitates this procedure; and finally, that this was clearly within the common law *powers* of a Grand Jury in 1791, however different the usual *practice* in England may have been at that time.

The abandonment of the English practice by which a private prosecutor took the initiative in criminal prosecutions necessitated radical changes of Grand Jury procedure in this country, such, for instance, as the investigation of an alleged crime before the preparation of the indictment, and the participation of the public prosecutor as a constant appendage of the Grand Jury, practically directing its proceedings. From the fact that the practice of proceeding at the instance of a private prosecutor was practically universal in England when our Constitution was adopted, it results that few, if any, reported English cases are found either justifying or criticising the American procedure. But, if it be necessary to show that the American practice was, under the common law, within the powers exercised by Grand Juries in England, we think that this will appear from the origin and early growth of the Grand Jury system, and particularly from the custom always recognized, but infrequently followed, of making pre-

sentments upon which indictments were subsequently prepared. When referred to these sources, the power of a Grand Jury clearly extends to the broadest kind of an inquisitorial proceeding. We think that counsel have mistaken a radical change of mere *procedure* for an attempted enlargement of *power*. Or if we are wrong in this, and it is a question of power, it will be clear that long before 1791 the American idea prevailed that the State and not the individual is the agency which should start a criminal prosecution; that this was vitally different from the English idea and necessarily involved radical changes in the grand jury system and the extension of its powers; and that it was with reference to such a system and such powers that the Fifth Amendment was adopted.

We shall first examine the reported precedents at the time of the adoption of the Fifth Amendment and for the first fifty years of our government, to show historically what has been the contemporaneous and practical view of the functions and powers of a grand jury. We shall then take up the later decisions to show by weight of authority that there need not be, before a grand jury may proceed, specific charges against a particular person, but that upon suggestion from the court, or the district attorney, or the grand jury itself, an investigation may be had to determine whether there has been a violation of a particular law, and, if so, who was guilty of it.

## I.

### Powers and Practice Generally Considered.

#### *(a) For the First Fifty Years of Our Government.*

Previous to the enactment of the Fifth Amendment careful research does not disclose any precedent for or historical explanation of the changes from the grand jury procedure of England which undoubtedly took place at an early day in this country. This is no doubt due to the incompleteness of the records of legal proceedings and adjudicated cases. Even during the first hundred years of our independence precedents are not numerous and authority for grand jury procedure rests not so much upon adjudications of the Courts, as upon practice sanctioned by long usage and general recognition.

For more than fifty years after the enactment of the Fifth Amendment, an examination of reported decisions does not disclose a single authority (except a decision in Tennessee influenced by an early Statute of that State) to support the contention of the appellant in this case. On the contrary, there are numerous expressions both of courts and text writers indicating that the procedure of grand juries in this country was in important particulars different from that prevailing in England.

As we have already said, the practice prevailing almost universally in England whereby the private prosecutor caused a bill of indictment to be engrossed and submitted for the action of the Grand Jury with but slight supervision on the part of the State's attorney, seems from an early day to have fallen into almost complete disuse here; while the practice, unknown in England, of having the prosecuting attorney attend as the official representative of the State before the Grand Jury, appears to have become almost universal.

The reason for these changes we shall deal with in another part of this brief and now examine the early precedents.

The first recorded expression upon the subject was contained in a series of lectures delivered in 1791 and 1792 by James Wilson, then a Justice of this Court, who had been a member of the Convention which framed the Federal Constitution and chairman of the committee of that body which reported that document. These were the first law lectures delivered in this country. They were delivered before the University of Pennsylvania, at Philadelphia, and are marked by great research and learning. No higher contemporaneous authority could be found.

In speaking of the powers of grand juries Judge WILSON said (Vol. 2, Wilson's Works, Edition of 1896, page 213):

> " It has been alleged, that grand juries are confined,
> " in their inquiries, to the bills offered to them, to the
> " crimes given them in charge, and to the evidence
> " brought before them by the prosecutor. But these
> " conceptions are much too contracted; they present
> " but a very imperfect and unsatisfactory view of the
> " duty required from grand jurors, and of the trust re-
> " posed in them. They are not appointed for the prose-

" cutor or for the court; they are appointed for the " government and for the people; and of both the gov- " ernment and people it is surely the concernment " that, on one hand, all crimes, whether given or not " given in charge, whether described or not described " with professional skill, should receive the punishment, " which the law denounces; and that, on the other hand, " innocence, however strongly assailed by accusations " drawn up in regular form, and by accusers, marshalled " in legal array, should, on full investigation be secure " in that protection, which the law engages that she shall " enjoy inviolate.

" The oath of a grand jury man—and his oath is the " commission, under which he acts—assigns no limits, " except those marked by diligence itself, to the course " of his inquiries: Why, then, should it be circum- " scribed by more contracted boundaries? Shall dili- " gent inquiry be enjoined? And shall the means " and opportunities of inquiry be prohibited or re- " strained?"

Another contemporaneous expression is contained in the charges to grand juries by Judge ADDISON, who was the President of the Courts of Common Pleas of the Fifth Circuit in the State of Pennsylvania. These charges show a wide experience in grand jury practice. At the September Sessions of the Common Pleas Court, in 1791, in charging the Grand Jury, he called their attention to the form of oath then administered, which was not different in form from that now in use, and particularly to that portion of it charging them to investigate "those things which they may know." He said:—

" If the Grand Jury, of their own knowledge, or the " knowledge of any of them, *or from the examination of* " *witnesses*, know of any offence committed in the county, " for which no indictment is preferred to them, it is " their duty, either to inform the officer, who prose- " cutes for the state, of the nature of the offence, and " desire that an indictment for it be laid before them; " or, if they do not, or if no such indictment be given

> " them, it is their duty to give such information of it to
> " the court; stating, without any particular form, the
> " facts and circumstances, which constitute the offence.
> " This is called a presentment. But the person so ac-
> " cused cannot be called to answer to this, till it is
> " drawn up in form; which it is the duty of the officer
> " for the prosecution to do. The best way to do this,
> " is to draw up a formal indictment, and present it to
> " the same jury, for their sanction. But if the present-
> " ment state all the material facts and circumstances,
> " I see no reason why such indictment, coupled with
> " this presentment of the jury to the same effect, should
> " not, without any subsequent examination and appro-
> " bation by a Grand Jury, be sufficient, and I believe it
> " would be sufficient, to call on the party to answer."
>
> *Addison's Pennsylvania Reports*, Appendix, p. 38.

The significance of this statement is the fact that a presentment may be based upon knowledge derived by the Grand Jury from the examination of witnesses as well as from their own personal knowledge. Knowledge of that kind cannot be obtained in any manner other than by an inquisitorial proceeding where the Grand Jury endeavors, upon the suggestion that a crime has been committed, to ascertain whether that is a fact and, if so, who committed it.

In 1795 Judge IREDELL, of the United States Circuit Court, said, in *United States vs. Mundel*, 8 Va. (6 Call.), 245-247:

> " And it is incident to the nature and constitution of the grand jury to indict when they receive *information* of a crime. The latter was said to be a presentment merely, and not an indictment; but that is not strictly correct: For the difference between them is this, If the grand jury present of their own knowledge, it is a presentment only; but, if on the knowledge of others, it is an indictment."

This utterance was relied upon below by the appellant as authority for his contention; but it has no such tendency. It merely refers to the original distinction between a presentment and an indictment, but it does not declare that a Grand Jury

may not base a presentment upon information received from others. Indeed, the rest of the Judge's opinion seems to indicate that he entertains no such narrow view. The question involved was whether the indictment was valid when the name of the prosecutor was not written at its foot according to the direction of a statute of the State of Virginia. The Court held that that statute only related to a prosecution at the instance of an individual, and said that that did

> " not prevent the attorney for the public from preferring
> " an indictment *ex officio ;* or *the grand jury from find-*
> " *ing one of their own accord.* For, *besides* the authority
> " which the attorney had at common law, which is not
> " taken away by the state statute, the act of congress
> " makes it his duty, if he sees cause, to prosecute, *ex*
> " *officio,* ' all delinquents for crimes and offences, cogniz-
> " ' able, under the authority of the United States,' Act
> " September, 1789, cap. 20, s. 35 : And it is incident to
> " the nature and constitution of the grand jury to
> " indict *when they receive information of a crime.*"

From the context it is evident that instead of meaning what the appellant contends, the Court intended to express the opinion that the Grand Jury had power both to present and to indict upon information obtained by them of their own motion from any source, which, of course, is the basis for the inquisitorial power contended for.

In 1829 in the case of *Ward vs. State*, 2 Missouri, 120 (marginal paging), a witness was called before the Grand Jury and questioned as to " What person or persons have so bet on " faro other than himself and not naming himself." The Supreme Court said, referring to objections made to such questions :

> "The first in order is, that the grand jury have no
> " right to interrogate a witness in this general way ;
> " but that an indictment should have been drawn up,
> " charging some particular persons with crimes, and
> " that the witness should then be required to give his
> " testimony as to the matter of the indictment. Other-

" wise the grand jury may send for every person in " the county, and inquire generally of each if he " knows of any offences against law; and that this " would be oppressive to witnesses, and dangerous to " citizens.

" The first answer to this is, that it is the duty of " the grand jury to inquire diligently of all offences " against law. Now if it should ever happen that a " grand jury should determine to have summoned " every person in the county, with a view to make the " experiment, if perchance they might find out some " offense, I have no doubt that it would be the duty of " the Court to withhold its process and stop such a " course. This would be an abuse of power.

" The next answer to this is, that no such case ap- " pears by the record. I take this case to be an ordi- " nary case, when perhaps the jury had *probable cause* " *to believe that some offences had been committed* " *against law;* and that so believing, they desired in " discharge of their oaths, and of their duties to their " country, to inquire; and how should they inquire ? " Not by going into the secret recesses of gamblers and " gambling devices, to ask and seek information, but to " send for persons who might, in their opinion, be most " likely to possess evidence relating to these matters. " It is a solemn and important duty that every citizen " owes to his country, to give evidence in Courts of " Justice against offenders against the peace and good " order of the community. A grand jury should be " considered trustworthy in this matter. They stand " as a rampart between the malicious or incensed prose- " cution in case of life and death; no man can be " brought to trial, on the lowest or the highest offences " known to the law, unless the grand jury shall say so; " yet they are not to be trusted with the power to send " for witnesses, till some malignant prosecutor or some " injured person shall cause an indictment to be sent up " to them. This would strip them of their greatest " utility, would convert them into a mere engine, to be " acted upon by Circuit Attorneys or those who might " choose to use them. This point is untenable."

In 1831 Daniel Davis, then Solicitor General of the State of Massachusetts, a public prosecutor of experience, published a book on "*Precedents of Indictments*," to which was prefixed a treatise upon the general subject. At page 2, Mr. Davis says, commenting upon the form of the grand jurors' oath :

> "The offences, which the grand jury may make the "subjects of their inquiry, are not, strictly speaking, "restricted to those which may be enumerated in the "charge of the court. Some offences may have been "committed during the session of the court, after the "grand jury have received their charge, and before "they are dismissed. In these cases they have the same "right to examine and present them, as though they had "been specially directed concerning them, in "the charge of the court; and where an offence has "come to the knowledge of any of the body, it is their "duty to communicate it to the grand jury, that such "proceeding may be had as they may think their duty "requires."

At page 18 he continues in relation to the mode of procedure before the Grand Jury :

> "This mode varies, in some respects, in the different "States, and from the practice in England. In the "latter country, the prosecutor must cause his bill to "be prepared and engrossed on parchment, before it is "preferred to the grand jury. *In the States of New "York, Massachusetts, and, probably, in most of the "United States, the bill is not drawn or preferred until "after the examination of the witnesses by the grand "jury, nor until after it has been ordered.* This is "undoubtedly the most rational and convenient course. "*Indeed, no bill can be correctly or safely drawn, until "the state of the evidence, upon which it is found and "is to be supported, has been minutely examined, and "is thoroughly understood.* Guilty persons often "escape, and public prosecutions are often defeated, "from negligence or misinformation as to the minute "state of facts in the cases examined. This fact nat-

" urally suggests the inquiry, What is the duty of the " grand jury, and of the public prosecutor, in this " stage of a public prosecution ? "

And in relation to the drawing of the indictment it is said on page 28 :

" The distinctions and difficulties above stated (of " indictments failing on account of technicalities), may " be, and are avoided, in all cases where the indictment " is not drawn and presented, until after the grand " jury have heard and considered all the evidence, and " *have decided upon the offence for which the bill is to* " *be found.* In such case, the bill is always drawn " *conformably to the evidence*, and may contain as " many counts as the nature of such evidence will " justify, and may render expedient. Such is and has " been the practice in Massachusetts and other States, " and is found to be most convenient, and strictly con- " formable to the nature of criminal proceeding."

The next reported case is *State vs. Freeman*, 13 N. H., 488, decided in 1842, where the question arose as to whether the omission of the words "a true bill" from the indictment invalidated the proceeding, the whole subject was fully considered. After referring at length to the practice in England the Court said :

" But here the practice is essentially different. No bill " is drawn up by a private person, in the first instance, " and laid before the grand jury with evidence to sup- " port it. Witnesses are first examined before the " grand jury, *who then determine whether the evidence be* " *sufficient to authorize them to prefer a criminal charge* " *against the accused.* If they think it is, an indictment " is drafted by the attorney-general or solicitor, and " signed by him. This proceeding is not like a charge " made by some other person, and laid before them for " their approval ; but the indictment is the result, in " legal form, of their deliberations. The reason for the " English form does not exist, for it is unnecessary that " they should certify that their own proceedings are

" true. There is, strictly speaking, no bill to be certi-
" fied to be correct in our practice,—the distinction be-
" tween a bill and an indictment which arises in England
" from their forms not being necessary here. *With us,*
" *the accusation does not take the form, first of a bill,*
" *and then of an indictment, but it exists only as the*
" *latter.*" * * *

Up to this time there had not been in any Court in this country a judicial expression which attempted to limit the inquisitorial powers of the grand jury, except in the case of *State vs. Smith*, Meigs, p. 99, decided in 1838, but the decision in that case is not significant or important, as we shall point out hereafter, for the reason that certain early statutes of the State of Tennessee expressly limited the power of the Grand Jury. In 1845, however, in the case of *Lloyd vs. Carpenter*, decided in Pennsylvania, there appeared the first well considered expression of any American Court showing a tendency at variance with the view expressed by Judge ADDISON, in the same State, fifty-four years before. We shall refer to this case below.

It thus appears that at the date of the adoption of the Fifth Amendment and for fifty years thereafter under the procedure sanctioned by usage and precedent an American Grand Jury (1) could proceed in cases other than those in which a private prosecutor presented a duly engrossed indictment, and (2) on its own motion or at the instance of the Court or the prosecuting attorney, could (and necessarily by an inquisitorial method) investigate an alleged or suspected crime and *after* the investigation direct an indictment to be drawn in accordance with the evidence.

### *(b) Mr. Justice Catron's View.*

After the decision in the *Mundel* case in 1795 the questions under consideration were not again discussed by any Federal Court until they came up in a case before Mr. Justice CATRON, of the Supreme Court of the United States, presiding in the Circuit Court for the Middle District of Tennessee. In that case the Grand Jury, without the agency of the District Attorney, had called witnesses before them, whom they interrogated as to their knowledge concerning the then late Cuban expedition.

The question was brought before Mr. Justice CATRON, who sustained the legality of the proceeding and compelled the witnesses to answer. His opinion is reported in a note to Section 337 of the Eighth Edition of Wharton's Criminal Pleading and Practice, and is as follows :

" *The grand jury have the undoubted right to send* " *for witnesses and have them sworn to give evidence* " *generally, and to found presentments on the evidence* " *of such witnesses ; and the question here is, whether* " *a witness thus introduced is legally bound to disclose* " *whether a crime has been committed, and also who com-* " *mitted the crime.* If a grand juror was a witness, he " would be bound to give the information to his fellow- " jurors voluntarily, as his oath requires him to do so. " And so also the general oath taken in court by a wit- " ness, who comes before a grand jury, imposes upon " him the obligation to answer such legal questions as " are propounded by the jury, to the end of ascertaining " crimes and offences (and their perpetrators) that the " jurors *suppose to have been committed.* If general in- " quiries could not be made by the grand jury, neither " the offence nor the offender could be reached in many " instances where common law jurisdiction is exercised. " In the federal courts such instances rarely occur ; " still they have happened in this circuit, in cases where " gangs of counterfeiters were sought to be detected ; " but especially in cases where spirituous liquors had " been introduced among the Indians residing west of " the Missouri River. That drunkenness, riots, " and occasionally murder, had been committed " by Indians who were intoxicated was notorious ; " but who had introduced the intoxicating spirits " into the Indian country was unknown. The fact of " introduction was the crime punishable by act of " Congress. In the Missouri District many such cases " have arisen ; there the grand jury is instructed, as of " course, to ascertain who did the criminal act. The " fact and the offender it is their duty to ascertain ; and " these they do ascertain constantly, by general inquiries " of witnesses, whether they know that spirituous liquors

" have been introduced into the Indian country; and, sec-
" ondly, who introduced them. It is part of the oath
" of the grand jury to inquire of matters given them in
" charge by the court, and to present as criminal such
" acts as the court charges them to be crimes or offences
" indictable by the laws of the United States. And in
" executing the charge it is lawful for the grand jury—
" and it is its duty—to search out the crime by ques-
" tions to witnesses of a general character. The ques-
" tions propounded by the jury in this instance, and
" presented to the court for our opinion, are in sub-
" stance: 'Please to state what you may know of any
" 'person or persons in the city of Nashville, who have
" 'begun or have set on foot, or who have provided the
" 'means for a military expedition from hence against
" 'the island of Cuba. 2d. Or of any person who has
" 'subscribed any amount of money to fit out such an
" 'expedition. 3d. Or do you know of any person who
" 'has procured anyone to enlist as a soldier in a
" 'military expedition to be carried on from hence
" 'against the island of Cuba? 4th. Or of any person
" 'asking subscriptions for, or enlisting as soldiers in,
" 'a military expedition to be carried on from hence
" 'against the island of Cuba?'

" As all these questions tend fairly and directly to
" establish some one of the offences made indictable by
" the Act of 1818, and are pertinent to the charge de-
" livered to the grand jury, they may be properly pro-
" pounded to the witness under examination, and he is
" bound to answer any or all of them, unless the answer
" would tend to establish that the witness was himself
" guilty according to the act of Congress.

" This doctrine is believed to be in conformity to
" the former practice of the state Circuit Courts of Ten-
" nessee, and is assuredly so according to the practice
" in other States, as will be seen by the opinions of the
" Supreme Courts and circuit judges found in Whart.
" Crim. Law, 3d ed., c. 6."

After Justice CATRON'S decision in 1851, the practice of Grand Juries and the decisions of the State and Federal

Courts continued to recognize broad inquisitorial powers in a Grand Jury. Exceptions to the general trend of American authorities appear only in some of the decisions in Tennessee, one in North Carolina, one in the United States District Court in that State, and one in Georgia, besides decisions in Pennsylvania, to one of which we have already referred.

*(c) In the Federal Courts.*

The most comprehensive judicial utterance of a Federal Judge upon this subject is the much quoted charge delivered by the late Justice FIELD to a Grand Jury in California. He said (30 Fed. Cas., 994; 2 Sawyer, 667):

> "We return now to the inquiry as to what matters you can direct your investigation beyond those which are brought to your notice by the district attorney. Your oath requires you to diligently inquire, and true presentment make, 'of such articles, matters and things as shall be given you in charge, or otherwise come to your knowledge touching the present service.'
>
> "The first designation of subjects of inquiry are those which shall be given you in charge; this means those matters which shall be called to your attention by the court, or submitted to your consideration by the district attorney. The second designation of subjects of inquiry are those which shall 'otherwise come to your knowledge touching the present service;' this means those matters within the sphere of and relating to your duties which shall come to your knowledge, other than those to which your attention has been called by the court or submitted to your consideration by the district attorney.
>
> "But how come to your knowledge?
>
> "Not by rumors and reports, but by knowledge acquired from the evidence before you, or from your own observations. Whilst you are inquiring as to one offense, another and a different offense may be proved, or witnesses before you may, in testifying, commit the crime of perjury.

"Some of you also may have personal knowledge of "the commission of a public offense against the laws of "the United States, or of facts which tend to show that "such an offense has been committed, or possibly at- "tempts may be made to influence corruptly or improp- "erly your action as grand jurors. If you are person- "ally possessed of such knowledge, you should disclose "it to your associates; and if any attempts to influence "your action corruptly or improperly are made, you "should inform them of it also, and they will act upon "the information thus communicated as if presented to "them in the first instance by the district attorney.

"But unless knowledge is acquired in one of these "ways, it cannot be considered as the basis for any "action on your part.

"We, therefore, instruct you that your investigations "are to be limited: First, to such matters as may be "called to your attention by the court; or, second, may "be submitted to your consideration by the district "attorney; or, third, may come to your knowledge "in the course of your investigations into the matters "brought before you, or from your own observations; "or, fourth, may come to your knowledge from the dis- "closures of your associates."

It will be observed that the limitations placed by Mr. Justice FIELD upon the inquisitorial powers of the Grand Jury do not relate to matters brought to their attention either by the Court or by the District Attorney, and that they permit a general investigation of a crime upon the "personal knowledge" of a juror, where such knowledge goes no further than to include "facts which *tend* to show" that a crime has been committed, which, of course, implies the power to call witnesses other than the grand juror having such knowledge.

In *United States vs. Kimball*, 117 Fed. Rep., 156, the Federal Grand Jury in New York City undertook an investigation of the transactions of the Seventh National Bank with the object of discovering whether its affairs had been lawfully conducted. At the time of the investigation no specific charges had been brought against any particular persons. In fact, the

Grand Jury did not even know whether a crime had been committed. On a motion to quash the indictment on the ground that the person indicted had given evidence against himself before the Grand Jury, Judge THOMAS said (p. 161):

> "An important national bank had failed, and the
> "cause did not appear. No person could be brought
> "before a magistrate, because no one was accused, and,
> "so far as appears, no one was known or suspected,
> "nor had it been ascertained whether the failure arose
> "from criminal acts or the misfortunes of business.
> "*The investigation was intended to discover facts, and*
> "*determine whether such facts showed that an offense had*
> "*probably been committed. The proceeding was mere*
> "*investigation, directed to discovery, not aimed at specific*
> "*individuals. But, as the defendants show by pertinent*
> "*authority, upon the evidence taken at any and all times*
> "*before it, a grand jury may select probable offenders*
> "*and find indictments against them.*"

In *Frisbie vs. United States*, 157 U. S., 160, the question was whether it was necessary that an indictment should be endorsed "a true bill." An examination of the practice in this country relating to indictments was involved and Mr. Justice BREWER, writing the opinion of this Court, said (p. 163):

> "It may be conceded that in the mother country,
> "formerly at least, such indorsement and authentica-
> "tion were essential. * * * (Citing an English
> "case.) But this grew out of the practice which there
> "obtained. The bills of indictment or formal accusa-
> "tions of crime were prepared and presented to the grand
> "jury, who, after investigation, either approved or dis-
> "approved of the accusation, and indicated their action
> "by the indorsement, 'a true bill,' or 'ignoramus,' or
> "sometimes, in lieu of the latter, 'not found,' and all
> "the bills thus acted upon were returned by the grand
> "jury to the court. In this way the indorsement be-
> "came the evidence, if not the only evidence, to the
> "courts of their action. *But in this country the common*
> "*practice is for the grand jury to investigate any alleged*

> " *crime, no matter how or by whom suggested to them,*
> " *and after determining that the evidence is sufficient to*
> " *justify putting the party suspected on trial, to direct the*
> " *preparation of the formal charge or indictment.*"

To substantially the same effect is Judge NELSON'S opinion in *United States vs. Reed*, 27 Fed. Cas., 737.

In *United States vs. Terry*, 39 Fed. Rep., 355, the Court said, at page 359:

> " The district attorney informs the grand jury of the
> " nature of the charge, and calls their attention to the
> " provisions of the statutes supposed to have been
> " violated. The witnesses are then produced and
> " examined, and it is only when the jury are satisfied
> " that the offense has been committed by the accused
> " that the district attorney is directed to prepare the
> " formal indictment."

See, also, *United States vs. McAvoy*, 18 Howard's Practice (N. Y.) Reports, 380–382.

*(d) In the State Courts.*

It needs no reference to authorities to establish that the District Attorney of New York County frequently submits alleged or suspected crimes to the Grand Jury, and that they do exercise inquisitorial powers both on their own motion and on the suggestion of the District Attorney (see *Briefs for The Assistance of Grand Jurors*, published by District Attorneys Hall, Phelps and Martine in 1855, 1879 and 1887, respectively).

Counsel for the petitioner below cited the New York cases of *People ex rel. Hackley vs. Kelly*, 24 N. Y., 74, 79, and *People ex rel. Pickard vs. Sheriff*, 11 N. Y. Civ. Pro., 172, 185, as authorities to show that in theory the English practice continues, because, as was said in the *Hackley* case, " the indict-
" ment is supposed to be prepared and taken before the grand
" jury by the counsel prosecuting for the State; and the evi-
" dence is then given in respect to the offence charged in it."
But the Court, in that case, was meeting an argument that an examination of a witness was not under an indictment within the meaning of a state statute. The decision can mean no more than that when the Grand Jury have reached a con-

clusion they return an indictment which *relates back* to the beginning of the proceeding for the purpose of sustaining an examination of a witness thereunder. This, of course, must be so. But we call attention to the significant language in the Pickard case that "the practice, however, is for the district "attorney *to inform the jury of the charge to be investigated,* "*and if a bill is found, to prepare an indictment such as the* "*jury conclude to present.*" This is evidently contemplates the most informal and general charge, which is only to become specific after a hearing and the finding of such an indictment, "*as the jury conclude to present.*"

*Webster's case*, 5 Greenleaf, 432, cited below, may be similarly commented upon.

In *State vs. Terry*, 30 Missouri, 368, the defendant indicted for perjury had been asked before the Grand Jury whether he did not know of "any person who had bet any money or prop- "erty upon any game of cards within Cole County and within "the twelve months then last past. Whether he, the said "Henry Terry, had seen any person or persons within the "twelve months then last past in Cole County bet any money "or property at or upon any game played at or by means of "cards, or any other game and device. Whether he, the said "Henry Terry, had any knowledge whatever that the law pro- "hibiting gaming and playing at cards for money or property "had been violated by any person at all."

The Court held on the authority of *Ward vs. State, supra*, that the questions were properly asked and he was lawfully indicted for perjury for answering them untruthfully.

In *ex parte Brown*, 72 Missouri, 83, it was said (page 94):

> "A grand jury has a general inquisitorial power. "They may ask a witness summoned before them with- "out reference to any particular offense which is the "subject of inquiry, what he knows touching the viola- "tion of any section of the criminal code."

In *Commonwealth vs. Smyth*, 11 Cush., 473, the Court after discussing fully the English practice of first preparing the indictment proceeds as follows (page 476):

> "No formal bills are ever previously prepared to be "preferred before them (the Grand Jury), as in the

"English practice; but they receive and act upon all "complaints which any individual may think fit to sub- "mit to them, and determine in what cases accusations "shall be made. In these decisions, they always act for "the commonwealth, and never for a private prosecutor. "Bills of indictment are drawn up by the attorney for "the government under their direction, and in conform- "ity to their decisions."

See also, *Price vs. Commonwealth*, 21 Gratt., 846, 856.

In *State vs. Wolcott*, 21 Conn., 272-280, it is said;

"Grand-juries * * * have a right to originate "charges against offenders, without forewarning them of "their proceedings against them. A different practice "may have been followed in England, and in our sister "states. Ours has been effective to secure the rights "of our citizens, and has been so long pursued as a "safe one, as to forbid courts to *change the law*, without "legislative sanction."

In *State vs. Magrath*, 44 N. J. (Law), 227, the Supreme Court of New Jersey (BEASLEY, C. J.), after referring to the English practice, said (page 229):

"But in this state, as every practitioner is aware, "the mode of proceeding with respect to the particular "in question is very different from the practice above "described. In our procedures, bills are not drawn up "beforehand and presented for adoption or rejection by "the grand jury, but, to the contrary, they are drawn "subsequently to the investigation, and consequently "there are no bills in this course of law which are "marked 'not found.'"

In *Blaney vs. State of Maryland*, 74 Md., 153, 156, Blaney was indicted by the Grand Jury for murder without previous commitment, and he moved that the indictment be quashed on several grounds. The Court said of the powers of the Grand Jury:

"However restricted the functions of grand juries "may be elsewhere, we hold that in this State *they*

" *have plenary inquisitorial powers*, and may lawfully " themselves, and upon their own motion, originate " charges against offenders though no preliminary pro- " ceedings have been had before a magistrate, and " though neither the Court nor the State's Attorney " has laid the matter before them. The peace, the " government and the dignity of the State, the well- " being of society and the security of the individual " demand, that this ancient and important attribute " of a grand jury should not be narrowed or interfered " with when legitimately exerted. That it may in some " instances be abused is no sufficient reason for deny- " ing its existence. Though far-reaching and seemingly " arbitrary, this power is at all times subordinate to the " law, and experience has taught that it is one of the " best means to preserve the good order of the Com- " monwealth and to bring the guilty to punishment."

And a Grand Jury investigating one person may indict another.

In *People vs. Northey*, 77 Cal., 618, the Court said, at page 627:

" The grand jury has within the scope of its in- " quiry all public offenses committed triable within its " county, (Pen. Code, Sec. 915) and, though it takes up " for examination a charge against one person, if it " should appear from the testimony taken on such ex- " amination, that sufficient reasons exist for putting " another person on his trial, they can and should find " an indictment against such other person."

Even in Pennsylvania where some restrictions not common in other jurisdictions have been imposed upon the powers of the Grand Jury acting on its own motion, their power to act at the instance of the District Attorney is recognized.

In *McCullough vs. Commonwealth*, 67 Pa. St., 30, the Supreme Court of Pennsylvania said, page 33:

" In the Federal courts, and in some of the states, " it has been held that the grand jury alone may call

" witnesses and institute all prosecutions of their own " motion, and without the agency of the district attor- " ney: 1 Whart. C. L., ed. 1868, ss. 453 and 458. In " this state the power of the grand jury is more re- " stricted, and the better opinion is that they can act " only upon and present offences of public notoriety, " and such as are within their own knowledge; such as " are given to them in charge by the court, and such as " are sent up to them by the district attorney."

In *Rowland vs. Commonwealth*, 82 Pa. State, 405, 408, the Court, speaking of the power of the Grand Jury to act upon the matter brought to its attention by the Prosecuting Attorney, said:

" It is thus apparent that upon considerations involv- " ing the maintenance of the public security it has been " found necessary to lodge this extraordinary and delicate " authority somewhere, and it is apparent also that it has " been lodged in the prosecuting officer of the Common- " wealth. It is to be exercised, in the ordinary case, " under the supervision of the proper court of criminal " jurisdiction, and in all cases its exercise is subject to " their revision and approval. The action of the officer " and the court could be brought here for purposes of " review only when the abuse of their discretion should " be found to have been both manifest and flagrant."

In *Commonwealth vs. Green*, 126 Pa. State, 531-538, it is recognized that the Courts of that State take a narrower view of the powers of a Grand Jury than that " accepted in the United States Courts," and in " most of the states."

A brief reference to the text writers will be useful.

In *Thompson and Merriam on Juries*, SECTION 615, SUBD. (2), it is said:

" These expressions of opinion (referring to authori- " ties) bristle with evidence of the inquisitorial power of " the Grand Jury to inquire of their own motion into " offenses of every character punishable by the court, of " which it is a component part. Nor are the reports bar-

"ren of authority to show that the Grand Jury, having "probable cause to suspect violations of law, may, in ac- "cordance with their oath, diligently inquire in respect "of the same. In the discharge of this duty they may "summon witnesses to a reasonable number, who are "bound to testify to their knowledge of the matter in "hand, with the usual limitation, of course, that they "shall not be required to disclose that which would im- "plicate themselves. * * *

"§ 612. * * * It is everywhere conceded to be "within the province, if not the particular function of the "court, to direct the attention of the Grand Jury to the "investigation of *such violations of law as are of common* "*report in the community; to enjoin a searching scrutiny* "*of the causes, and a presentment of persons, against* "*whom, in their judgment, well-founded complaints exist.*"

And in § 615, Subd. (1), the following opinion of Judge ADDISON in relation to the duties of a Grand Jury in 1792, is quoted (the italics are in the text):

"The matters, which, whether given in charge, or of "their own knowledge, are to be presented by the Grand "Jury, are *all* offenses within the county. To Grand "Juries is committed the preservation of the peace of "the county, the care of bringing to *light*, for examina- "tion, trial and punishment *all* violence, outrage, inde- "cency and terror, *everything* that may occasion danger, "disturbance or dismay to the citizens. Grand Juries "are *watchmen*, stationed by the laws, to survey the con- "duct of their fellow citizens, and inquire where, and by "whom, public authority has been violated, or our Con- "stitution or laws infringed" (Add. Pa., Appendix, 47, 48, 36).

See, also, WHARTON'S CRIMINAL PLEADING AND PRACTICE, 8th Ed., Sec. 388.

*(e) The Contrary View.*

A dictum of Recorder GOFF in the *Matter of Morse*, 42 Misc., 664, was cited below. That case was disposed of on the ground that the record showed that the witness was being

examined, not in relation to any charge then under investigation by the Grand Jury, but in relation to an indictment for perjury already found against one Dodge. The Recorder quite properly found that the Grand Jury were without jurisdiction. The Recorder did, however, add that the power of the Grand Jury to act depended upon whether it appeared "by complaint or information *or knowledge acquired that there is reason to believe* that a crime has been committed. * * * There must be *reason to believe* that a crime of a specific character has been committed by a particular person whose name may be either known or unknown to the grand jury."

This is far from saying that there must be a written complaint, or that there must be any formulated charge. Even the rule laid down by the Recorder would be satisfied if the Grand Jury had knowledge from which they thought it probable that some one had committed a crime.

*O'Hair vs. The People*, 32 Ill. App., 277, was also cited below. If there is any significance in the decision in that case, it is under the peculiar statute of the State of Illinois. But as to the practice, we call the attention of the Court to the opinion of the Court, indicating the most informal and general procedure by the State's attorney before an indictment is found. The practice seems to be for the State's attorney to subpœna witnesses even before the Grand Jury is empanelled, and examine them with a view to presenting an informal charge.

In Tennessee a statute was passed in 1801, prohibiting a district attorney from preferring a bill of indictment to the Grand Jury "without a prosecutor marked thereon" (see Shannon's Annotated Code, § 7058), and the Courts have constantly withheld from Grand Juries any general powers to inquire as to crimes without such a bill before them. Statutes passed from time to time have conferred in the case of specific crimes broad inquisitorial powers upon the Grand Jury (see Section 7016, Shannon's Annotated Code), and, where attempts have been made to exercise the power in relation to offenses not specifically mentioned in these statutes the Courts have refused to uphold indictments. Perhaps these decisions may be correct under the rule obviously intended to be recognized in the Statute of 1801. But in view of the legislative

policy of the State, there has not been the same occasion for extending or modifying the common law procedure because wherever the Legislature has been of the opinion that the Grand Jury should have general inquisitorial powers, it has specifically conferred them by statute. It might well have been held under the Statute of 1801 quite irrespective of the common law rule, that there was a Legislative intent to be implied withholding the inquisitorial power from a Grand Jury in all cases where it was not expressly conferred. The subject has been dealt with in Tennessee in the following cases:

*State vs. Smith*, Meigs, 99.
*Glenn vs. State*, 1 Swan, 19.
*Harrison vs. State*, 4 Coldw., 195.
*State vs. Robinson*, 2 Lea, 114.
*State vs. Adams*, 2 Lea, 647.
*State vs. Barnes*, 5 Lea, 398.
*State vs. Lee*, 3 Pickle, 114.

Judge KING of the Court of Quarter Sessions in 1845 (in *Lloyd vs. Carpenter*, 5 Penn. Law Journal, 55), delivered a charge or instruction to the Grand Jury, which had made a written communication to the Court. The Grand Jury stated that it had been charged before them that two public officers had been guilty of converting to their use certain moneys. The jury asked that certain witnesses be sent for and the Court compel the production of certain books and papers. The substance of the decision of the Court is that the ordinary method of criminal procedure in the State of Pennsylvania is to proceed first before a magistrate and not until he has heard the charge to present the matter to the Grand Jury. Various reasons are adduced to show the wisdom of this method. Attention is then called to the extraordinary methods of criminal procedure: *first*, where the Court directs the Grand Jury to investigate matters of great public import; *second*, where the Attorney-General *ex officio* prefers an indictment before a Grand Jury without a previous binding over or commitment of the accused.

The Court speaks also of a presentment from the jury's own "knowledge or observation," and practically holds

that in such a case the Grand Jury's knowledge must be such as need not be fortified by the testimony of witnesses. But it will be observed that the right to institute an extraordinary proceeding before a Grand Jury (1) upon a charge of the Court or (2) at the instance of the State's Attorney or (3) in a matter of great public import, even though no indictment or formal charge is framed in advance, is not questioned and, to that extent at least, the opinion of Judge KING is not adverse to our contention. The Pennsylvania Courts have since taken a view (see cases cited above) as to the independent power of the function of the Grand Jury which is more restricted than that generally taken by the Courts of this country.

In *Lewis vs. Board of Commissioners*, 74 North Carolina, 194, 199, the English practice is more closely adhered to, and it is held that a prosecutor has the right to have a matter laid before the Grand Jury only by having the prosecuting attorney frame a bill of indictment on which shall be endorsed the name of the prosecutor.

It is also held that the solicitor has no business in the grand jury room and has no power to advise them. It is said:

> "They do not communicate with the solicitor, but "with the court, either directly or through an officer "sworn for that purpose. They act upon their own "knowledge or observation, in making presentments. "They act upon bills sent from the court, with the wit- "nesses. The examination of witnesses is conducted by "them, without the advice or interference of others. "Their findings must be their own, uninfluenced by the "promptings or suggestions of others, or the opportunity "thereof. We know there have been wide departures "from the principles here announced, in this and, per- "haps, in other judicial districts. It has become neces- "sary, therefore, to review the ground, and recur to the "earlier and more correct practice as it was established "by those who have gone before us, and has been handed "down by tradition and the recollection of the oldest "members of the court."

We have quoted thus fully from this case in order to point out that in many particulars in which the common law practice has been entirely abandoned in most localities it is thus adhered to in North Carolina and particularly that the function of the prosecuting attorney is far different there from what it is in this State and generally in the Federal Courts. The decision is not, therefore, an authority of much weight in this case.

The *Lewis* case was decided in 1876 and in 1883 a question involving the powers of a grand jury came up in the Western District of North Carolina, in *United States vs. Kilpatrick*, 16 Fed. Rep., 765, and United States District Judge DICK based his decision principally upon the *Lewis* case, saying, as to the decisions of the Supreme Court of that State, that he "adopted their views as to the common law of this State, as I think such views are not in conflict with any decision of the Supreme Court of the United States, or with any positive congressional legislation."

Judge DICK decided that the prosecuting attorney has no right to go before the Grand Jury and he said that he had given permission to that officer to go before the Grand Jury only "when requested by the foreman, or when they regard "their presence necessary for a speedy and proper adminis-"tration of justice." But he said (page 770) that when he did permit that officer to go before the Grand Jury he could not "give opinions upon questions of law which affect the rights "and liberty of the citizen charged with crime, or give any "advice as to the weight and sufficiency of evidence" * * * and (p. 777) that he exercised "that privilege only by the "express permission of the Court."

Although the District Judge cites with apparent approval the well-known opinion of Mr. Justice FIELD he does not seem to regard it as a statement of the correct practice.

We have referred fully to this case to show (1) that it is avowedly based upon the State practice in North Carolina and (2) that it withholds from the Grand Jury and the District Attorney powers which are generally conceded to them in other Federal Court Districts and in most of the States ; and, therefore, that it is not valuable as an authority. It should be noted too in this connection that when *United States vs. Kilpatrick* was decided the *Frisbie* case had not been decided by the

Supreme Court. Judge DICK would have had difficulty in avoiding the force of that decision.

In the case of *In re Lester*, 77 Ga., 143, 148, the Mayor of Savannah, who was also a judge of the Police Court of that city, was subpœnaed to produce the records of the Court before the Grand Jury before it had been impanelled and sworn. The Court refused to commit him for contempt for disobeying the subpœna. The first and sufficient ground for the decision was that proof of the records of his Court could only be made by copies thereof duly certified by the Clerk under the seal of the Court.

The Court said that the inquisitorial powers of the Grand Jury are to be "exercised within well defined limits;" that the Grand Jury have no power "to force private persons" to state who have violated the law or "to make every man a spy upon the conduct of his neighbors and associates;" that they have no power to compel a witness to violate the confidence implied in holding social intercourse or to force him to become a public informer. These propositions were not necessary to the decision of the case. The narrow view of the Court was probably based on local practice which had grown up under the Code of Georgia and which requires the testimony of witnesses before the Grand Jury to be "in a particular case;" and the general language of the opinion as to searches and general warrants is all qualified by the following:

> "In saying thus much, however, we do not intend "to intimate that the state's prosecuting officer may "not, if he sees proper to do so, make search for evi- "dence and secure its forthcoming by serving subpœnas "upon witnesses in anticipation of the impanelling and "qualification of the grand jury before whom the "matter is to be investigated."

It is difficult to see from the general language of the Court where they would place the limit upon the power of the Grand Jury for they say:

> "It is the right of any citizen or of any individual of "lawful age to come forward and prosecute for offenses "against the State, or when he does not wish to become "the prosecutor, he may give information of the fact to

> " the grand jury, or any member of the body, and in
> " either case it will become their duty to investigate the
> " matter thus communicated to them, or made known to
> " one of them, whose obligation it would be to lay his
> " information before that body."

But how could they "investigate the matter thus communicated to them" without calling other witnesses and thus, in the words of the Court, making each witness "a spy upon the conduct of his neighbors and associates" and compelling him "to violate the confidence implied in holding social intercourse with his fellows by forcing him to become a public informer"? Some of the most striking language of the Court would logically restrict the power of the Grand Jury to the point of impotence, but it is obvious that the Court was not prepared to go to the logical extreme and, perhaps, used the language by way of caution in a case where there was another conclusive ground for their judgment.

This review shows that by the weight of authority in the State and Federal Courts a Grand Jury has the power, and it is the common practice, to investigate, by examining witnesses, any matter or charge which may come to their attention either through personal knowledge or through statements made to them by others or which may be laid before them by the prosecuting attorney; and to postpone the framing of an indictment until it has completed such investigation.

It is claimed, however, that such investigation may not be an inquisitorial proceeding directed to ascertain whether a crime has been committed and, if so, by whom, but that any matter submitted by the District Attorney or even by the Grand Jury itself must be a specific charge against some particular person. This claim we shall now examine.

## II.

### A SPECIFIC CHARGE AGAINST A PARTICULAR PERSON IS NOT ESSENTIAL TO GIVE THE GRAND JURY JURISDICTION.

A general suggestion by the District Attorney that a person or corporation has been guilty of a violation of a criminal

provision of a United States statute is sufficient to justify the Grand Jury in investigating such suggestion in order to determine the time, place and circumstance of such violation.

A. A bill of indictment must be drawn with technical accuracy because the defendant is entitled to know the precise nature of the charge. When under the English practice a private prosecutor submitted to the Grand Jury a bill of indictment he was obliged to stand on that indictment. If the indictment was not found he was mulcted in costs, and, if the prosecution failed, he thus furnished evidence on which the person accused could sue him for malicious prosecution. The restraining influence of these incidents of an unsuccessful prosecution seems to have been regarded as a sufficient safeguard against abuses of this practice, although finally abuses did arise which had to be corrected by legislation (Vexatious Indictments Act of 1859, 22 and 23 Vict., c. 17). The private prosecutor conducted the prosecution set on foot by the bills prepared and submitted by him, and employed counsel at his own expense, who acted " with only slight supervision by officers of the government."

*Thompson and Merriam on Juries*, Sec. 609.
*1 Bishop's Criminal Practice*, Sec. 278.
*Harris Criminal Law*, (Am. ed. by Force), 288.

Indeed, until a recent date, the practice, shocking to an American's sense of propriety and justice, prevailed (and it is not prohibited now) of a law officer of the Government acting as counsel for a criminal defendant.

*Reg. vs. Gurney*, 11 Cox C. C., 414, 422 and 423, Note *a*.

Criminal prosecutions before a Grand Jury in England at the time of the establishment of the judicial system of the United States were almost always commenced by private prosecutors. But the courts of this country have never thought it wise policy to permit a private prosecutor to take any part, except as a witness, in setting the machinery of the criminal law in motion. It is believed here that the State is interested in preventing and punishing crime and that no individual citizen should have the power to determine whether a criminal proceeding should or should not be commenced and

prosecuted. Mr. Justice FIELD well expresses *(supra)* the American idea thus:

> "You will not allow private prosecutors to intrude
> "themselves into your presence, and present accusations.
> "Generally, such parties are actuated by private enmity,
> "and seek merely the gratification of their personal
> "malice. If they possess any information justifying the
> "accusation of the person against whom they complain,
> "they should impart it to the district attorney, who will
> "seldom fail to act in a proper case."

This is a condemnation of the whole theory of the English practice. And it seems quite clear that the practice now almost universal in this country under which the public prosecuting officer initiates and supervises the proceedings before the Grand Jury removes the chief necessity, which arose in England from the intervention of a *private prosecutor*, for the formulation of a specific charge against some particular person. The presumed impartiality of the prosecuting officer and the secrecy of the proceedings which avoids the disgrace possibly attending the publicity of even unsustained charges, no doubt led to the growth in this country of the practice of Grand Juries of considering charges before they knew who was the particular person accused or the specific nature of the crime charged—that is, before they knew such date and circumstances as it would be necessary to aver in a bill of indictment presented by a private prosecutor. Even in Pennsylvania where as early as 1705 the English practice was retained by statute to the extent of requiring that the name of the prosecutor should be placed upon the indictment, it was held in 1769 that this statute did not apply where there was no real prosecutor, *i. e.*, where the prosecution took its rise from the Grand Jury, or we might add with equal reason from the prosecuting attorney.

*The King vs. John Lukens*, 1 Dallas, 7.

When the necessity for presenting a formal bill was done away with, a specific charge against a particular person in any other form became both illogical and unnecessary; and neither

in England nor in this country can any authority be found that such a charge must be made.

B. We consider next the nature of the power of the Grand Jury to find an indictment upon what is generally, but, as we think, inaccurately, defined as their "own knowledge;" for to this power may be referred the broad inquisitorial procedure so common in this country. Counsel for the appellant seeks to give to these words the narrow construction limiting them to such knowledge as a witness must have before being permitted to testify to a fact—that is knowledge as distinguished from hearsay. The authorities do not sustain such a construction, and the early history of grand juries shows that the knowledge on which they could proceed to investigate was such as they acquired by rumor or common repute.

In its beginnings the Grand Jury seems to have been devised as a convenient method to assist itinerant Justices in England in detecting crime and punishing it. They seem clearly to have been expected to investigate, and originally they indicted frequently, on mere rumor.

In Pollock & Maitland's History of the English Law (Vol. 2, p. 639, 622), a description of the Grand Jury before the time of Edward I. is given, founded on Bracton and Britton:

> "The ancestors of our 'grand jurors' are from the "first neither exactly accusers, nor exactly witnesses; "they are to give voice to common repute."
>
> * * * * * * *
>
> "From the very first the legal forefathers of our "grand jurors are not in the majority of cases supposed "to be reporting crimes that they have witnessed, or even "to be the originators of the *fama publica*. We should "be guilty of an anachronism if we spoke of them as "'endorsing a bill' that is 'preferred' to them; but "still they are handing on and 'avowing' as their own "a rumor that has been reported to them by others. "* * * Some of the verdicts that are given must be "founded upon hearsay and floating tradition."

Bracton, in his "De Corona," Twiss' Edition (Vol. 2, Chap. 22, fol. 143, Twiss' Ed., p. 451) says:

> "Now, we must speak of persons indicted upon "common fame, which raises a presumption, and by "which we must hold, until the person indicted has "purged himself of the said suspicion. From fame "indeed suspicion arises, and from fame and suspicion "a grave presumption, nevertheless it admits of proof to "the contrary or of purgation."
>
> See, also, Vol. 2, fol. 116*b*.

In Reeves' History of the English Law (Vol. 1, p. 457 and Vol. 2, p. 293), the author indicates the methods of accusation towards the end of the reign of Henry the Second.

> "Thus, as a person indicted *per famam patriae* was "charged by the *patriae*, or twelve jurors elected, in the "manner before mentioned, who had founded the accusa- "tion upon their own knowledge or persuasion, collected "from observation or report, it became the judge, if he "had any doubt, or suspected the jury, to make strict "examination into the matter, and ask the twelve how "they learned what they, in their verdict, declared con- "cerning the person indicted, and, upon their answers, "he might judge whether the charge was founded in "truth or malice."

For further authorities, see, also,

Stephen's History of the Criminal Law of England, Vol. 1, p. 253.
Huband's The Grand Jury in Criminal Cases in Ireland, p. 8.
Britton, 22-26.
Stubbs' Constitutional History of England, Vol. 1, 661 *et seq.*
Stubbs' Select Charters, p. 259:
Taylor's Origin and Growth of the English Constitution, p. 329.

Three or four hundred years later support is found for this view in the case of *The Earl of Macclesfield vs. Starkey*, 10 Howell's State Trials, 1330, which was decided by the Court of Exchequer in 1684.

This was a case of a presentment by a Grand Jury, based

not entirely upon their own knowledge, but upon the evidence adduced before them.

The facts of the case were briefly these: It was a time of great civil disturbance in England, just after the insurrection of the Duke of Monmouth, and the King had published a declaration concerning the conspiracy against his government. The Grand Jury sworn to inquire in the County of Chester conceived it expedient to present their apprehensions of danger from a dissatisfied party in the county, and they declared that they conceived it expedient that certain persons, naming them, should be obliged to give security for the peace, particularly the Earl of Macclesfield.

After this, the Earl of Macclesfield sued Starkey, one of the grand jurymen, for *scandalum magnatum*, claiming ten thousand pounds damages. This was an action granted under several statutes. The defendant pleaded that he, with others, naming them, according to law, in the accustomed manner, were impanelled and returned to be of the grand inquest before the justices, were sworn and charged to inquire for the King and the county of Chester "*de certis articulis ibidem eis per prefatos justiciarios traditis*" (of certain articles given over to them by the said justices) and that the defendant, and those other persons that were of the inquest "*secundum juramenti sui debitum, et secundum evidenciam et testimonium eis ibidem exhibitum de prefato comite ac juxta eorum conscientias ac ad conservandam pacem, etc., debito modo presentaverunt*" (upon their oath, and in accordance with the evidence and the testimony concerning the said Knight given before them, and obeying their consciences, and in order to maintain the peace, etc., did present in the accustomed manner).

The plaintiff contended that the whole action of the Grand Jury was void and irregular and that, therefore, an action would lie against them, in spite of the fact that they were grand jurymen. The decision of the Court, however, was unanimous for the defendant. The argument for the defendant, before the barons of the Court of Exchequer, was made by Mr. John Holt, who is said in the report of the case to have probably been the lawyer who afterwards became famous as Chief Justice of England. Mr. Holt argued (p. 1356):

> "I think it will be easily agreed to me, that it is not
> "necessary for the grand jury, to stay till an indictment

" be drawn up by an officer or other person in form, and " in Latin, and so in their inquiry to confine themselves " only to such bills of indictment as are prepared and " presented in form to them; but they are to enquire " and presentment make of all things that are given " them in charge, and the court they present unto hath " conusance of, that they have any notice or knowl- " edge of themselves, *or, are informed by any person,* " and this without doubt they may do: and it is the " constant universal practice of grand juries after they " have dispatched the bills that are brought to them in " form, they go and consult amongst themselves what " they know of their own knowledge, *or are informed of,* " concerning any of the matters relating to the business " of the country within their charge and authority, and " according as upon enquiry they find matter to present, " they do present it to the court, and that very often " without the strict form in paper and in English; this " is done by them every assizes and sessions.

" And what is the effect of this? why what is " double, the officer of the court receiveth the present- " ment and draws up a bill upon the matter presented " into form, which the jury find as an indictment, or " else it is used as evidence to another grand jury, the " next assizes or sessions, to find a bill of indictment " upon, and commonly indeed this latter way is taken: " the clerk of the assize, or clerk of the peace, reserves " these informal presentments as evidence for a succeed- " ing grand jury, to find bills by him drawn up there- " upon. Now, my lord, this being the practice all over " England, I know not why it should come to be a fault " in our case, to do it here. * * *

" My lord, with submission it is not necessary for " justices of Oyer and Terminer to enquire always by " indictment. They have another way, and that by the " express words of their commission '*per sacramentum* " *proborum et Legalium Hominum de Comitatu ac alijs* " *viis Modis et Medijs quibus melius sciverint per quos,* " *rei veritas melius sciri poterit*' (by the oath of good " and lawful men of the county, and by whatever other " ways and means, which may be better known to them " (by which) the truth of the matter may be more

"surely discovered) of those offenses of which "they have conusance, so that it is not necessary "that the proceedings and informations of a Grand- "jury to all intents and purposes, should be by indict- "ment, for the very commission gives authority to "make inquiry as well by other means and ways where- "by the truth may best be known, as by the oaths of "honest and lawful men. If then they have authority "to enquire by other ways and means, surely the way "of presentments, and desire to take security of the "peace as occasion shall be, is a good and legal way of "proceeding; and surely, if it be considered it will "appear to be a very merciful presentment to desire "only security of the peace in such matters as are "therein contained."

Holt, in his argument, continually dwells upon the point that the Grand Jury represents the county and stands guarding the interests of the public. On page 1362, after noting that individuals, on proper cause, may require other individuals to be pledged to give security for the peace, he continues:

"And is not then the fear of a whole county, cause "to have such persons, as they apprehend danger from, "bound to the peace. And is not the fear of a grand "jury that represents the county declared in their pre- "sentment upon oath, a legal ground to demand secur- "ity for the peace? If private men upon their private "fears may desire and ought to be secured, I think the "county upon their public fears much more."

On page 1371, reciting the necessities of the occasion, he states:

"When there hath been a horrid conspiracy and "treason discovered, of which some that are accused "are attainted and executed, others fled, and among "them the principal person, who not long before had, "with a very great number of gentry and others, come "into the country, and there had been on that account "a tumultuous disorderly assembly, why should it not "be rational for a grand jury in such a juncture to "apprehend these things might be dangerous to the

" country ? And if they do apprehend them dangerous, " they are obliged by their oaths, and bound by the " duty they owe to God and the king, and by the trust " that is reposed in them, as inquisitors for their country, " to make such prudent and discreet representations of " their fears, and the grounds and reasons of them, to " the court, before whom they are sworn, and that can " apply proper remedy ; in order to get security for the " preservation of the peace, and therein as far as in " them lies, secure the government and prevent the " dangers, that in their apprehensions threaten it."

And again Mr. HOLT proceeds :

" It is the oath of a grand juryman, 'you shall dili- " gently inquire and true presentment make of all such " things as shall be given you in charge,' &c., but I " think it is seldom known that all the articles of which " the court hath conusance, or the jury power and " authority to enquire and present upon, are given in " charge; but commonly the judge gives those in his " charge that are the most material.

" Then the case comes to this, here is perhaps an " article omitted in the charge, but that is a matter of " which that court hath conusance and which by the " law is inquirable of by the jury, and they do enquire " upon it, and present. May they do this? Yes, sure, " and it is done most unquestionably every day ; if it " be an article within the judge's power and commis- " sion to hear and determine, they ought to do it by " their oaths, and it can be no satisfaction to the con- " science or integrity of a grand juryman, that because " the judge omitted to give that matter in charge, he " should neglect the trust reposed in him to present " mischief and danger to his king and country. It is " justifiable certainly to present in such a case, and " therefore the particular articles need not be set forth, " for if they were, perhaps the thing presented was " not one of them, and yet the presentment might be " legal."

It is worth noting that, in this presentment, *no charge was brought against any particular person even by the presentment.* Against no person was an accusation brought which he could answer. The Grand Jury simply stated that they deemed it advisable, for the interests and security of the public, that certain persons should be obliged to give security for the peace. It is true that the names of the persons were given whom they suggested should be treated in this manner, but the accusation was not one to which a plea could be made, or which could be tried in court.

These references serve to show that the narrow construction given to the rule that a Grand Jury may act only on the personal knowledge of its members has no foundation in the early history of the institution. It may be that by the development of the conditions of Anglo-Saxon civilization it has come to be the practice not to act as in the olden time on mere rumor, but it is equally certain that no support is found in the history of the institution for applying to "personal knowledge" the narrow meaning sometimes given it. A middle ground not susceptible of exact definition is the result of modern conditions of civilization; and it is probably expressed as definitely as practicable in the words of Justice FIELD, where, in construing the part of the oath to the Grand Jurors which required them to inquire in relation to matters which might "otherwise come to your knowledge touching the present service," he said that this referred to matters other than those called to their attention by the Court or District Attorney and from which they acquired knowledge "*from evidence before you.*" Here is involved the power to *investigate a matter* but not to find an indictment *except on evidence of witnesses.*

The procedure in this country where a Grand Jury without the previous submission of a formal indictment, makes an investigation either (1) on their own motion or (2) on the charge of the Court or (3) on the suggestion of the District Attorney presents in all essential features the same situation as those existing where under the English practice a Grand Jury proceeded with a view to making a presentment; and the powers of inquisition which we find exercised under a radically

different procedure adapted to the conditions in this country are no doubt to be attributed to the powers always conceded to a Grand Jury conducting an investigation preliminary to making a presentment. And if the *power* exists the proper manner of its exercise is to be sought not in the English but rather in the American precedents.

C. A specific charge against a particular person involves definiteness. But are date and circumstance and the technical accuracy characteristic of an indictment necessary to the exercise of jurisdiction by the Grand Jury? Clearly not. For if it were it would necessarily follow that a person indicted could inquire into the proceedings, and if it was found that they did not originate in a specific charge the indictment must be quashed for that technicality, even though it charged a crime sufficiently established by the evidence before the Grand Jury.

Furthermore, a witness could object to answering a question because he claimed that the proceeding was not properly inaugurated; and on such an objection he could demand a ruling by the Court as to whether under the charge presented to the Grand Jury the question was admissible; and thus an investigation begun before the Grand Jury would soon assume the aspect of a trial in Court, subverting the whole purpose of the Grand Jury system and seriously affecting the administration of justice.

Moreover, if an oral or written charge be necessary it could be amended from time to time as evidence might be produced justifying such amendment; or, if the point were raised that the Grand Jury had proceeded without a sufficiently definite charge it would be a very simple matter to make a charge and a second time introduce the same evidence and reach the same result. But the law would avoid all such circumlocutions.

It is quite obvious that, from the nature of the case, the whole matter must be in the hands of the Grand Jury itself and they must have the power to prescribe the method in which they will proceed.

D. The contention of the appellant would necessarily lead to the violation of the rule that the proceedings of the Grand Jury are to be kept secret. If a formal charge is neces-

sary to the jurisdiction of a Grand Jury a witness (and *a fortiori* the accused) would be entitled to ask before he is compelled to testify what the charge was and to examine it to see if it was technically sufficient. But that would be a disclosure of the secrets of the jury room which has never been permitted anywhere. And if the claim of the appellant be conceded that a charge be necessary, it must also follow that he has the right to object to the admissibility of evidence on the ground that it is not competent under the charge. But there are abundant authorities in the Federal Courts to the effect (1) that the granting of such a right would necessarily result in a violation of the secrecy of the proceedings of the Grand Jury and (2) that a witness has no right to question the regularity of the proceedings of a Grand Jury.

In *United States vs. Brown*, 1 Sawy., 533 (Fed. Cas. 14,671), the Court said at page 1274 :

> " Neither the motion to set aside, nor the motion to
> " quash, will lie where the objection does not appear or
> " arise upon the face of the indictment, or perhaps the
> " records of the court. This being so, the affidavits of
> " the defendants impugning the conduct and judgment
> " of the grand jury, cannot be considered on the hear-
> " ing of this motion. If the contrary practice were
> " established, there would be no need of grand juries,
> " and the court would necessarily assume both the
> " function of indicting and trying criminals ; for it
> " is safe to presume that in most cases the defend-
> " ant would object to being tried upon the indictment,
> " and support such objection by his affidavit that he be-
> " lieved the grand jury acted upon incompetent or in-
> " sufficient evidence. The wit of man could not devise
> " a mode of indicting which would not be liable to this
> " objection from the defendant."

In *McGregor vs. United States*, 134 Fed. Rep., 187, the plaintiff-in-error based his appeal, in part, on alleged error of the Court below in refusing to quash the indictment because of " illegal and inadmissible testimony " received by the Grand Jury, and it was claimed that no legal or competent

evidence was received by the Grand Jury. The Circuit Court of Appeals held (p. 192):

> "This motion was simply an effort to revise the "judgment of the grand jury, and was in fact an appeal "from the jury to the court for the purpose of determin- "ing whether or not the jury acted upon sufficient proof "in finding the indictment. We have not been favored "by counsel with any authority justifying such a pro- "cedure as was asked for concerning this matter in the "court below, and if any case exists where such a course "has been followed we are unable to find it. * * * "It is doubtless true that grand juries frequently con- "sider testimony that would be held inadmissible by a "trial court, for such juries are not usually well in- "formed concerning the rules of evidence, nor the rights "and privileges of the parties whose alleged offenses "they are examining into. Such incompetent evidence, "if subsequently offered at the trial, would be ex- "cluded, or, if admitted, would by an appellant court "be held to be error, and any judgment founded "thereon would be reversed. In cases like this, where "the record discloses that many witnesses were ex- "amined, and much documentary evidence considered "by the grand jury, it is quite apparent that it would "be subversive of our criminal procedure, and de- "structive of the rules formulated to promote the due "administration of justice, to establish a practice "under which indictments might be quashed because "of the consideration by the grand jury of the improper "testimony given by one witness among many, or the "reading by such jury of a statement irregularly sub- "mitted to it, which may likely have had but little in- "fluence in the conclusion reached by the jury" "* * * The proceedings before a grand jury should "always be conducted in secret, and should not be "made public, unless in those peculiar and rare in- "stances in which the ends of justice imperatively re- "quire it; this case, in our opinion, not being of that 'class."

In *United States vs. Cobban* 127 Fed. Rep., 713, upon pleas filed by the defendant to several indictments found against him, the Court said (p. 718):

> "The remaining pleas are based upon the testimony "presented to and the proceedings had before the jury, "and directly raise the question of the right of the "court to investigate and consider such testimony and "proceedings. * * *
>
> "Clearly, this involves an investigation of the testi- "mony produced before the jury, and a determination "of its relevancy and sufficiency. If it be admitted "that any of the testimony can be reproduced, then it "all must be, if the defendant demands it, for there is "no possible place in principle to draw the line be- "tween that which shall and that which shall not be "received. We thus have the spectacle of the court "sitting as one of error and review upon the case as "heard before the grand jury, and this upon the sole "demand of the defendant. I confess this is contrary "to all my conceptions of the practice, and, if estab- "lished, must lead to the miscarriage of justice. All "that secrecy of investigation, which, for ages, has "been associated with the grand jury system, and which "has been deemed an efficient means of its successful "operation, is swept away and all its proceedings "must be made, if the defendant so wills, as public as "those of a town meeting. * * * To establish this "rule of inquiry, and carry it to its legitimate conclu- "sion, would, in my opinion, result in a shield to crime, "for which, it must be admitted, there are already many "avenues of escape."

See, also,

*United States vs. Farrington*, 5 Fed. Rep., 343, at p. 347.
*United States vs. Perry*, 39 Fed. Rep., 355.
*United States vs. Reed*, 2 Blatchf., 435, at p. 466.
*United States vs. Ambrose*, 3 Fed. Rep., 283.

If the appellant had presented facts showing that his constitutional rights were endangered, the Court might well have inquired generally, whether, from the facts which the Grand

Jury deemed it advisable to disclose, and from the presumptions which the Court would indulge, the Grand Jury was transcending its power. But the record does not show that any such danger existed. The statement of the Assistant District Attorney, acquiesced in, and adopted by, the Grand Jury, was that the proceeding was under the so-called "Sherman Act," and that, in testifying, the witness would be exempted under the Immunity Act of 1903. How could it be practicable or proper that more than this should appear in order to protect the witness in the exercise of his constitutional privilege? Even if it had been necessary to make a charge, setting forth the date and circumstance of the alleged crime, it would have been inconsistent with the duty of the Grand Jury to make a more complete disclosure as to what it was; for, by putting into the possession of an officer of one of the defendants facts which that defendant was not, before an indictment was found, entitled to know, they would have defeated the chief object of the rule of secrecy which a Grand Jury is bound to observe. If a charge more specific than that which may be fairly inferred from the statement of the District Attorney be necessary, the Court will presume that it was made. In other words, the Court will presume that both the Grand Jury and the District Attorney proceeded in accordance with their sworn duties and in accordance with law.

In *United States vs. Terry*, 39 Fed. Rep., 355, the Court said, at page 359:

> "The usual, and, I believe, invariable, method of
> "procedure in cases submitted to grand juries in
> "this court must, in the absence of any averment or
> "suggestions to the contrary, be presumed to have been
> "followed. The district attorney informs the grand
> "jury of the nature of the charge and calls their at-
> "tention to the provisions of the statutes supposed to
> "have been violated. The witnesses are then pro-
> "duced and examined, and it is only when the jury are
> "satisfied that the offense has been committed by the
> "accused that the district attorney is directed to pre-
> "pare the formal indictment."

In a similar case (*United States vs. Hunter*, 15 Fed. Rep., 712) the Court said, at page 714:

> "The district attorney is an officer of the court, and
> "who cannot be presumed to be influenced by any de-
> "sign only to enforce and vindicate the law, hence his
> "statements must be relied upon by the court as true,
> "and induced only by a proper sense of official duty."

And in *United States vs. Reed*, 2 Blatchf., 435, at page 466, the Court said:

> "No case has been cited, nor have we been able to
> "find any, furnishing an authority for looking into and
> "revising the judgment of the grand jury upon the evi-
> "dence, for the purpose of determining whether or not
> "the finding was founded upon sufficient proof, or
> "whether there was a deficiency in respect to any part
> "of the complaint; and the grounds and reasons which
> "we have briefly alluded to, account sufficiently for the
> "absence of any such precedent. * * * In the ad-
> "ministration of criminal justice, confidence must be
> "reposed somewhere; and it must be admitted that
> "there are few bodies concerned in it that may be
> "more safely trusted than the grand inquest of the
> "county."

It will also be assumed, if necessary, that the matter before the Grand Jury was laid before it by the District Attorney. Judge WALLACE, in his opinion below (Record, p. 30), said: "In the present case it does not appear that the investigation was initiated *sua sponte* by the grand jury, and it may be inferred from the participation of the United States attorney in the proceeding that it originated in his informal presentation of the charge to them." And if the charge did originate with the Grand Jury, it will be assumed that the District Attorney acquiesced in and adopted their act (*United States vs. McAvoy*, 18 How. Pr., N. Y., 380-382).

E. If the Assistant District Attorney, representing the United States, before the witness was called upon to testify, had

presented to the Grand Jury a charge, stating that he was in possession of information which led him to believe that there had been a violation of Section 1 of the Anti-Trust Law, in that the two defendants at a particular time had entered into a combination in restraint of interstate trade, that certainly would have constituted, under any reasonable rule, a sufficient charge to justify the Grand Jury in acting. While the record here does not show any such statement, yet the Assistant District Attorney did state that a proceeding was pending under the Anti-Trust Law; and it was not necessary to go further; for, in view of the statement of the character of the questions asked and documentary testimony called for, it is impossible that, in any prosecution of the witness on account of his testimony, it could successfully be claimed that the hearing before the Grand Jury did not relate to the Anti-Trust Law, but did, in fact, relate to a charge under some other statute which did not, like the Anti-Trust Law, afford to the petitioner immunity from prosecution. This, really, should be the test as to whether the petitioner's rights as a witness before the Grand Jury have been properly safeguarded.

Moreover, the attitude of the witness showed that he regarded the evidence called for as material, for he objected on the ground that it would incriminate him. He could not interpose that objection capriciously; to make it available, the possibility of crimination must have appeared from the circumstances (*Burr's Trial*, Federal Cases No. 14692*e*; *U. S. vs. McCarty*, 21 Blatchford, 469; *Ex parte Irvine*, 74 Fed. Rep., 954; *Wigmore on Evidence*, section 2271). The record of the proceedings discloses no possibility of crimination, except under the criminal provisions of the Anti-Trust law; and, if the evidence had that tendency, it must have been material to the inquiry. And, if that be so, a witness should not be permitted to raise an objection that all the technicalities of Grand Jury practice have not been complied with.

F. It is doubtful whether, except in a most extreme case, a witness has any right at all to raise such objections as those raised here, and certainly not unless it clearly appears that his constitutional rights are in danger. A witness before a Grand Jury has no right to inquire whether that body is properly constituted and a lawful body.

In *ex parte Haymond*, 91 California, 545, a witness subpœnæd before a Grand Jury refused to appear and testify on the ground that the jury was not a lawful body. He was convicted of contempt and sentenced to fine and imprisonment. He sued out a writ of *habeas corpus*. He contended that the record of the proceedings in ordering, selecting, summoning and impanelling the Grand Jury showed the greatest irregularity and a violation of plain statutory provisions.

The Court held that the petitioner, on his own showing, was regularly and properly convicted, and said (p. 547):

> "Without passing upon the question whether the "Grand Jury before whom the petitioner was summoned to appear was impanelled in accordance with "the provisions of the law relating to that subject, it is "sufficient for us to say that such a body has certainly "a *de facto* existence, and, this being so, the witness "was clearly guilty of contempt in refusing to testify.
>
> "When a court having legal authority to impanel a "grand jury has sworn and impanelled a competent "number of persons as such, and itself recognizing the "body so formed as a lawful grand jury, charges it with "the duties of a grand jury, and it is engaged in the "performance of such duties, *a person summoned to "testify before it cannot raise the question of its competency to act. His duty is to testify as required, "leaving the question of legality to be tested in the modes "provided by law by those who may have an interest in "the question.*"

If a witness may not raise such questions of jurisdiction, it follows, *a fortiori*, that he may not raise questions of procedure like those raised by the appellant here.

We submit that the conclusion from I. and II. must be that a Grand Jury may without a specific charge proceed under the supervision of the Court or on the general suggestion of the District Attorney to conduct an inquisitorial proceeding to determine whether a suspected crime has been committed and if so by whom, subject at all times to the restraint of the Court where such power is being abused.

## III.

NO INCONVENIENT OR UNJUST RESULTS CAN ATTEND THE ADOPTION OF THE RULE WE CONTEND FOR, AND SOUND PUBLIC POLICY DEMANDS THAT IT BE HELD THAT THE ACTION WAS PROPERLY SET IN MOTION IN THIS CASE.

A. It was contended below by the counsel for the appellant that to concede inquisitorial powers to a Grand Jury without in every case requiring a specific charge against a particular person would open up under the guise of the administration of justice possibilities of wrong and oppression "beyond conception."

Perhaps it is a sufficient answer to say that in the many jurisdictions referred to in our citations above, where inquisitorial powers much broader than those for which it is necessary for us here to contend, have been exercised by Grand Juries for many years, there has been no suggestion that they have been used as an engine of oppression. And it is quite clear that the system is surrounded with such safeguards that the danger of abuses is very remote.

In the first place the scope of the powers of a Grand Jury is limited by the jurisdiction of the Court of which it is an appendage (*United States vs. Hill*, 1 Brock., 156). It is also subject to the direction of the Court and cannot effectually exercise some of its most important functions without the interposition of the Court. It must resort to the Court to enforce by subpœna the attendance of witnesses, and it is only through the order of the Court that witnesses may be punished for contumacy (*Commonwealth vs. Bannon*, 97 Mass., 214; *Heard vs. Pierce*, 8 Cush., 338). The Court may inquire whether the Grand Jury has exceeded its powers (*People vs. Naughton*, 7 Abb. Pr. U. S., 421, 426; *Denning vs. The State*, 22 Ark., 131, 132), and may punish the entire jury or any of its members (*Turk vs. State*, 7 Ohio Pt. II., 240, 243; *State vs. Cowan*, 1 Head, 280; *re Ellis*, Hemp., 10). Thus while the Grand Jury is an independent body, its independence is confined within well-defined limits. That this appellant is able to delay an investigation of an alleged violation of law affecting millions of citizens of this country is due to the fact that he could not be committed for

contempt until the *Court* had ordered him to answer the questions which the Grand Jury had asked him.

But it is said that this point should be considered from the standpoint of a person under investigation; and that his liberty should not be put in jeopardy upon a roving unlimited examination not limited by some specific charge. Why should he be heard to complain? From time immemorial it has been considered one of the most useful attributes of a Grand Jury that it could investigate in secret and withhold from the person charged the fact that he was being investigated. It is clear, therefore, that no abuse of power can arise from the fact that an inquisitorial investigation is kept secret from the accused. He is protected by his right to answer the indictment and it furnishes slight basis for complaint on his part that the Grand Jury could not or did not formulate the charge before they began to take testimony.

Assertion of possible abuses is made, but how they are to be reasonably apprehended is not clearly pointed out. If the District Attorney or the Grand Jury make improper use of their powers the Court may at any time stop an investigation which is going beyond safe or proper bounds by refusing to compel witnesses to testify or produce evidence. Indeed, practically, the Court may fix the limits within which a Grand Jury may proceed. But the tendency of modern grand juries and prosecuting attorneys would hardly lead a Court so to intervene; for the danger of abuse is too remote. Indeed, the *existence* of the controlling power of the Court makes impossible the recrudescence of the dread horrors of the Spanish Inquisition pictured so graphically by counsel below.

B. On the other hand, considerations of sound public policy demand that inquisitorial power *shall* be exercised by the Grand Jury, particularly in a matter of wide public interest. It has always been supposed that in a matter where from the nature of an offense a large portion of the public is either interested or involved the Grand Jury can investigate of their own motion—and, of course, they could do so on the suggestion of the prosecuting attorney without a specific charge. Riots and conspiracies are familiar examples where such jurisdiction has been exercised. This is no doubt a survival of the ancient practice of the early grand juries

which acted upon mere rumor and has no doubt been retained in modern practice, because in no other way could such offenses be properly investigated. Such cases have been loosely described as matters of "public notoriety," but no court has ever attempted to define that expression. With the immense increase of the population and the development and extension of industrial and governmental agencies, affecting as they do through the medium of the telegraph, railroad and the press not only a greater number of people, but also a greater portion of the entire people, it would be a very inadequate view for this Court to take that a matter of public notoriety was to be confined to some riot, strike or other public disturbance affecting the people of some particular locality. With the development of civilization the significance of mere legal terminology must bend to the force of changed conditions; and if it is necessary in order to effectually investigate the so-called Tobacco Trust to deal with its supposed violation of the Anti-Trust law as a matter of public notoriety, the Court should aid the Government in so doing. By legal or illegal means that trust has a practical monopoly of the tobacco trade. Each day that fact affects millions of people in this country. This must be manifest to every Grand Jury in the country. But there are the same difficulties in proving specific violation of law in such a case as in the case of a riot called to the attention of grand jurors by common talk. So many people are concerned and so many acts committed that unless somebody has power to proceed to investigate by compulsory process, a public offense which through its *results* may be perfectly manifest to all, will go unpunished because, on account of the multitude of acts and the number of offenders, definite charges against particular persons may not be framed until a large number of witnesses shall have been examined. It is not like a case of proving that A on a certain day committed a theft; proof of criminating facts necessarily involves an examination of a multitude of circumstances which assembled together may prove a violation of law.

Every consideration of maintaining order and enforcing laws passed for the general good demands that the violation of the Anti-Trust law by an immensely powerful corporation con-

ducting its business in every part of the country should for the purpose of giving a Grand Jury jurisdiction be regarded as a matter of public notoriety.

## IV.

THE MATTER UNDER INVESTIGATION WAS SUFFICIENTLY COMMITTED TO THE GRAND JURY BY THE ORDER OF JUDGE LACOMBE.

If it be necessary the action of the Grand Jury may be sustained by treating the investigation as a matter committed to it by the Court. With the record before it, the Court directed the witness to answer the questions and produce the books and papers. This was tantamount to an approval of the investigation by the Court and was, in effect, giving the matter to the Grand Jury "in charge;" and so Judge WALLACE regarded the situation saying "that the action of the Court was equivalent to an express instruction to the Grand Jury to investigate the proceeding mentioned in the presentment" (fol. 53). And as we have said above this must *always* be the case before a witness may be compelled to answer.

## V.

THE STATEMENT OF THE DISTRICT ATTORNEY TO THE GRAND JURY WAS A SUFFICIENT CHARGE AGAINST THE TWO CORPORATIONS NAMED.

What we have said makes it very clear also that if a charge be necessary against a particular person which is not to have the technical accuracy of a bill of indictment, the statement made by the District Attorney in this case that two specified corporations have been guilty of a violation of the provisions of the Anti-Trust law fills every reasonable requirement. *Counsel for the appellant has never been able to make a suggestion of a further or different charge or statement except one that had all the technical accuracy of a bill of indictment.*

## VI.

WHETHER A CAUSE OR ACTION UNDER THE TITLE MENTIONED IN THE SUBPOENA WAS PENDING IS UNIMPORTANT. THE PROCEEDING MIGHT HAVE PROCEEDED WITHOUT A TITLE.

It is probably better practice to omit the title altogether on a subpœna to appear before the Grand Jury. It is not uncommon to entitle proceedings "In the Matter of John Doe," either because suspicion has not attached to any particular person or because the interests of justice require that the name of the accused be not disclosed.

In *United States vs. Reed*, 27 Federal Cases, 737, Judge NELSON said in relation to a proceeding before a Grand Jury:

> "There is no cause pending in court, or even before "the grand jury, in the legal sense of the term, at the "time the witnesses are sworn, and, in consequence, no "title to the proceedings can properly be given, or be "necessary to the validity of the oath. If the person "to be accused before the grand jury is named, it is "simply for the purpose of giving application to the "oath, or to the evidence under it; and, as we have "seen, this application has been regarded as sufficiently "direct and explicit when the oath is administered gen-"erally, and as relating to all persons concerning whom "charges are to be made before that body."
>
> * * * * * * *
>
> "But, we do not regard the memorandum given to "the clerk, as already referred to, in this case or in any "other, even where the accused are all specially "named when the oath is administered, as a title, within "the technical meaning of that term, but, as used "simply for the purpose of giving application to the "oath and to the evidence to be given thereafter under "it."

If no title is necessary, it follows that the title which was used may be disregarded as surplusage.

In *The Appeal of Hartranft*, 85 Pa. St., 433, the Supreme Court of Pennsylvania in some respects takes a narrow view of

the function of the Grand Jury. It holds that it is necessary that a subpœna should be issued in the name of some person, and thus is at variance with the decision in *United States vs. Reed.* But under the Pennsylvania State practice, it is necessary for the Grand Jury to apply to the Court for the issuance of subpœnas, and this language of the Court is particularly significant: "No doubt the Court might have directed a subpœna to have issued for the Commonwealth in "any case where the Commonwealth was a party or where it "was apparent it was in some way interested in some case or "transaction then depending." And again: "The Common-"wealth may have this process in any proceeding where its "interest is apparent, whether as a suitor or a prosecutor."

In the case at bar the United States was mentioned in the subpœna as the party presenting the charges against the corporation defendants. In the Hartranft case, however, the State was not a party or otherwise interested.

## SECOND: As to the Fourth Amendment to the Constitution.

It is contended that the compulsory production of the papers mentioned in the subpœna *duces tecum* would constitute "an unreasonable search or seizure," and be in violation of the provisions of the Fourth Amendment.

That Amendment provides as follows:

> "The right of the people to be secure in their per-"sons, houses, papers and effects against unreasonable "searches and seizures shall not be violated; and no "warrants shall issue but upon probable cause, sup-"ported by oath or affirmation, and particularly de-"scribing the place to be searched and the person or "things to be seized."

1. *The Amendment does not relate to the compulsory production of papers for use as evidence.*

A. There is not now and there never has been any procedure (except, perhaps, under the Rules in Equity) for the purpose of

securing evidence by compulsory writ where it is necessary to show probable cause or make any oath or describe any property or point out its locality. At the time when the independence of this country was declared, searches and seizures to obtain incriminating evidence had been only recently abandoned in England after the agitation by Wilkes aimed at the practice whereby the Secretary of State, an officer of the Crown, assumed to issue "general warrants" to search the premises of persons suspected of criminal libel, for the purpose of discovering evidence thereof (Lord CAMDEN in *Entinck vs. Carrington*, 19 State Trials, 1030). In this country (principally in Massachusetts) at about the same time occurred the agitation in opposition to the issuance by the Courts to Custom House officers of writs of assistance, which were like the ordinary warrant to search for stolen goods and which empowered revenue officers in their discretion to search suspected places for smuggled goods. These writs of assistance were no doubt prominently in the minds of the framers of the Fourth Amendment when they provided that warrants should be issued only upon probable cause (see *Paxton's case*, Quincy's Reports, 51, and Appendix, 395; *Cooley, Constitutional Limitations*, 6th Ed., 367), although it is, no doubt, also true that the Amendment "bears the impress of the contro-" versy as to general warrants which agitated England during " the Grenville ministry, and which, to the Colonists, had as-" sociated the claim of the British Executive to issue gen-" eral warrants with the claim to arbitrarily tax the Colonies" (*Wharton's Commentaries*, Section 560; see, also, *Cooley, Constitutional Limitations*, 7th Ed., p. 426).

But it is quite clear from the historical origin of the Fourth Amendment that it was not intended to limit the power of the judiciary when it was proceeding in the ordinary way through the writ of subpœna *duces tecum* to compel the production upon a trial in Court of documentary evidence. That writ had existed from time immemorial in England—long before general executive warrants came into use. Without such a writ it would be "utterly impossible to carry on the administration of justice" (*Summers vs. Moseley*, 2 Cr. & M., 477; and see exhaustive note *Wertheim vs. Continental R. & T. Co.*, 15 Fed. Rep. 718, and Lord ELLENBOROUGH in *Amey vs. Long*, 9 East 473). But its purpose and effect is totally

different from a search warrant and other writs of that kind. For the witness retains possession of the documents described in the subpœna. His right of privacy is not invaded; he need show them neither to the counsel nor, at least if they are incriminating, to the Court; and they cannot be impounded unless a seizure is made after compliance with the provisions of the Fourth Amendment. Finally, the witness is left to determine largely for himself whether the documents would tend to incriminate him and, in spite of the compulsory production of the papers, he retains his rights under the Fifth Amendment unimpaired. The maxim *nemo tenetur se ipsum accusare* (or *prodere*) on which that Amendment was based was a rule of common law long before searches and seizures had been complained of as grievances and was an adequate protection against incrimination of a witness by evidence produced by himself, whether oral or documentary. But the Fourth Amendment aimed at a different abuse, viz.: the seizure of papers or other tangible property by officers of the law in such a manner that the owner was deprived not only of his possession and control of them, but also of his right when they were produced as evidence to assert his privilege in order to avoid their incriminating effect (*Adams vs. New York*, 192 U. S., 585).

Bearing in mind these considerations it is difficult to see how under any circumstances a compulsory production of papers under a subpœna *duces tecum* can be held to be an unreasonable search and seizure, particularly where the papers cannot be used to incriminate the witness; and we have been unable to discover any case where it has been held that it is. On the contrary, it has been finally settled by the decision of this Court in *Interstate Commerce Commission vs. Baird*, 194 U. S., 25, that evidence produced in response to a subpœna *duces tecum* by a witness who is furnished effective immunity from prosecution on account of the incriminating character of the evidence is not a search or seizure under the Amendment. In the *Baird* case a violation of the Interstate Commerce law was alleged, and it was sought to compel the production of certain contracts and vouchers tending to support the charge. Objection was made, based upon both the Fourth and the Fifth Amendments. The objection was disposed of, however, on the authority of *Brown vs. Walker*, Mr. Justice DAY

writing the opinion. Referring to Justice BRADLEY'S opinion in the *Boyd* case *(infra)*, Mr. Justice DAY said (page 45):

> " In that opinion the learned Justice points out the
> " analogy between the Fourth and Fifth Amendments
> " and the object of both to protect a citizen from com-
> " pulsory testimony against himself, which may result in
> " his punishment or the forfeiture of his estate, or the
> " seizure of his papers by force, or their compulsory
> " production by process for the like purpose. * * *
> " As we have seen, the statute protects the witness
> " from such use of the testimony given as will result in
> " his punishment for crime or the forfeiture of his
> " estate. Testimony given under such circumstances
> " *presents scarcely a suggestion of an unreasonable*
> " *search or seizure.*"

And Mr. Justice MILLER speaks with equal emphasis in the *Boyd* case *(infra)* as follows (page 641):

> " I cannot conceive how a statute aptly framed to
> " require the production of evidence in a suit by mere
> " service of notice on the party, who has that evidence
> " in his possession, can be held to authorize an unreason-
> " able search or seizure, when no seizure is authorized or
> " permitted by the statute."

In the case of *In re Moser*, 101 N. W. Reporter, 591, decided by the Supreme Court of Michigan, the difference between the office of a subpœna *duces tecum* and a search warrant was under consideration. The petitioner was convicted of contempt of court, for refusing to produce before the grand jury, the books and records of a corporation, in obedience to a subpœna *duces tecum*. The Court states that the refusal at the trial was not based on fear of self-incrimination, though that ground was urged on the appeal. The grand jury was engaged in investigating charges of corruption against municipal officers, in connection with a contract between the city and a corporation and the witness subpœnaed was the president of the corporation.

After reviewing the evidence, the Court says (p. 592):

"Does the production of these books under the order
" of the court amount to unjustifiable search and seizure
" prohibited by the Constitution? The learned counsel
" counsel for the petitioner state their position upon
" this point as follows: 'There is no difference in prin-
" ' ciple between the forcibly seizing and carrying away
" ' of such books by the sheriff or other court officer,
" ' and the compulsory production of them on a sub-
" ' pœna *duces tecum*. If the officers of this company,
" ' whom the people are seeking to indict, have any
" ' rights in the information contained in those books,
" ' or in the books themselves, which would enable them
" ' to resist the sheriff if he sought to take the books
" ' away by force, then obedience to a subpœna *duces*
" ' *tecum* cannot be compelled unless the law will sanc-
" ' tion an attempt to do by indirection what it would
" ' be unlawful to do directly. * * * And therefore
" ' we contend that, even if there was nothing in these
" ' books which would involve Mr. Moser in a criminal
" ' charge, still he was right in his refusal to produce
" ' them if they contained evidence of the guilt of other
" ' officers and members of the corporation, persons who,
" ' if actually present, would have a right to take them
" ' and keep them for their own protection, as against all
" ' the powers of the prosecution.' The difference be-
" tween seizing record books and documents of another
" upon a search warrant, and the production of the
" same upon a subpœna *duces tecum*, is apparent. In
" the former the owner is absolutely deprived of all
" possession and control thereof, and they and their
" contents are subjected to the gaze and examination of
" others. In the latter the records and documents are
" not taken from the possession of the owner. They
" are produced in court by him in his possession, and
" only such matters therein as pertain to the issue in-
" volved can be subject to the examination of the proper
" officers of the court. The production of books and
" papers for inspection and use in suits, both civil and
" criminal, is as old as the law itself. Whether the

" production is by search warrant or by a subpœna *duces*
" *tecum*, the necessity therefor must be shown to the
" court, and the particular documents or records re-
" quired sufficiently specified in the application; and,
" in either process, courts will permit only the examin-
" ation of such parts thereof as relate to the issue
" before the court. The process for search and seizure
" is the only one usually resorted to to determine
" whether property stolen or unlawfully seized is in the
" possession of another. The usual process to secure
" evidence from records and documents is by subpœna
" *duces tecum*, and no case is cited where an attempt has
" been made to proceed by search warrant. No private
" individual can be compelled to produce his books or
" papers *for the purpose of affording evidence against*
" *himself in a criminal prosecution.*

In 1 *Greenleaf on Evidence* (16th Ed.), § 469*a*, the author takes a similar view, saying:

" But " (§ 469*f*) " the defendant's production of docu-
" ments after the manner of a witness is a different
" thing from the official seizure and impounding of
" incriminating documents. In the latter case, the
" defendant is not called upon to testify by producing
" the books; the situation is no different from the
" carrying away of a bundle of counterfeit bills or of
" stolen goods or of a murderer's weapon; no doubt the
" accused is unwilling that these things should be taken,
" but he is not being called upon as a witness; accord-
" ingly, the privilege is not violated, whether it is tools
" or clothing or documents that are taken."

If a subpœna *duces tecum* requiring a production of documents of an incriminating nature is contrary only to the prohibition of the Fifth Amendment, or if it violates the Fourth Amendment only because it compels him to produce incriminating evidence, in either case the appellant here is furnished immunity by the Act of February 25th, 1903, and on the authority of *Brown vs. Walker* and the *Baird* case is compellable to produce the evidence because this immunity removes any possible unreasonableness.

B. Some doubt has been thrown upon the proper scope of the Fourth Amendment by the language of Mr. Justice BRADLEY in the prevailing opinion in *Boyd vs. The United States*, 116 U. S., 616. It was sought by the Government to obtain certain books and papers in a suit to recover a penalty or forfeiture under a provision of the Revenue Law, which provided that on motion of the Government's Attorney the Court should have the power to require the defendant to produce in Court his private books, invoices and papers and that on failure to do so the allegations of the Government's Attorney should be taken as confessed. It was said by Justice BRADLEY that this was equivalent to a compulsory production of the papers to be used against the defendant or his property in a criminal prosecution, and that, in effect, it was an unreasonable search and seizure within the meaning of the Fourth Amendment; and he also held that it was in violation of the Fifth Amendment in that it compelled a person to be a witness against himself in a criminal case.

It is very plain, both from what is said by Mr. Justice BRADLEY of the historical origin of the Fourth Amendment and from the facts of the case to which the language of his opinion was applied, that his opinion rested principally upon the immunity which every person has, both under the common law and under the Constitution, from producing evidence which may tend to criminate him. It was not necessary for the decision of the case to hold more than this, and it was solely upon this ground that Mr. Justice MILLER and Chief Justice WAITE concurred in the judgment of the Court.

But Justice BRADLEY, in the course of his opinion, used the following words:

> "Breaking into a house and opening boxes and
> "drawers are circumstances of aggravation; but any
> "forcible and compulsory extortion of a man's own tes-
> "timony or of his private papers to be used as evidence
> "to convict him of crime or to forfeit his goods, is
> "within the condemnation of that judgment. *In this*
> "*regard the Fourth and Fifth Amendments run almost*
> "*into each other* (p. 630). * * * We have already
> "noticed the intimate relation between the two
> "amendments. They throw great light on each other.

"For the 'unreasonable searches and seizures' con-
"demned in the Fourth Amendment *are almost*
"*always made for the purpose of compelling a man*
"*to give evidence against himself*, which in criminal
"cases is condemned in the Fifth Amendment; and
"compelling a man 'in a criminal case to be a witness
"'against himself,' which is condemned in the Fifth
"Amendment, throws light on the question as to what
"is an 'unreasonable search and seizure' within the
"meaning of the Fourth Amendment. *And we have*
"*been unable to perceive that the seizure of a man's*
"*private books and papers to be used in evidence against*
"*him is substantially different from compelling him to*
"*be a witness against himself.* We think it is within
"the clear intent and meaning of those terms. * * *
"And we are further of opinion that a compulsory
"production of the private books and papers of the
"owner of goods sought to be forfeited in such a suit,
"*is compelling him to be a witness against himself,*
"*within the meaning of the Fifth Amendment to the Con-*
"*stitution, and is the equivalent of a search and seizure*—
"and an unreasonable search and seizure—within the
"meaning of the Fourth Amendment" (pp. 633, 634).

It is by no means clear what Justice BRADLEY means by saying that the Fourth and Fifth Amendments "run almost into each other" and that "they throw light on each other." Except in a limited sense, as we have already shown, the two Amendments had a different historical origin, and the protection of the Fifth Amendment is complete without resort to the Fourth Amendment; and it was complete under the facts in the *Boyd* case. The compulsory production of the papers in that case would have been a proper exercise of the court's power. But, for a failure to respond, the usual remedy would have been to commit the witness for contempt. Instead of such a provision, however, and without compelling him to attend in court to testify and produce the papers, the statute declared that the effect of his non-attendance should be deemed to be that he had incriminated himself. This is clearly an enforced self-incrimination and in violation of the Fifth Amendment. But why is it necessary to

resort to the Fourth Amendment? We see no good reason for it and that was the view of Justice MILLER and Chief Justice WAITE.

Mr. Justice MILLER, writing a concurring opinion, said (p. 639):

> "I am quite satisfied that the effect of the act of "Congress is to compel the party on whom the order "of the court is served to be a witness against himself. "The order of the court under the statute is in effect "a subpœna *duces tecum*, and, though the penalty for "the witness's failure to appear in court with the "criminating papers is not fine and imprisonment, it is "one which may be made more severe, namely, to have "charges against him of a criminal nature, taken for "confessed, and made the foundation of the judgment "of the court. That this is within the protection "which the Constitution intended against compelling a "person to be a witness against himself, is, I think, "quite clear. * * * But this being so, there is no "reason why this court should assume that the action "of the court below, in requiring a party to produce "certain papers as evidence on the trial, authorizes "an unreasonable search or seizure of the house, papers. "or effects of that party."

And Mr. Wigmore in his recent treatise on Evidence (Section 2264) says of the Boyd case:

> "The majority's opinion in *Boyd v. United States* "therefore mistreats the Fourth Amendment, in applying "its prohibition to a returnable writ of seizure describing "specific documents in the possession of a specific per- "son. But, apart from this error, the radical fallacy of "the opinion lies in its attempt to wrest the Fourth "Amendment to the aid of the Fifth. The 'intimate "'relation between them,' which the opinion predicates, "must be wholly denied. In the first place, the two "doctrines had had a totally different political and legal "history. Furthermore, if the privilege against self- "crimination had been regarded as violated by seizures

" of papers, it is singular that this principle did not
" suffice, without anything more, to defeat the practice
" of general warrants in Wilkes' controversy. And
" again, if it had any such bearing, it would have pro-
" tected equally against all warrants, whether general or
" specific, lawful or unlawful. Nor can we suppose that
" the framers of the Constitutions and Bills of Rights,
" with Wilkes' pamphlets and Otis' speeches fresh in
" their memories, could have believed that they were
" merely duplicating one principle in the two clauses of
" the same document. In short, the principles of the
" Fourth and the Fifth Amendments are complementary
" to each other ; what the one covers, the other leaves
" untouched."

We submit that it was only necessary in the *Boyd* case for the Court to decide that the effect of the statute under consideration was to compel the witness to produce evidence incriminating himself and was for that reason contrary to the Fifth Amendment. But even if the statute be regarded from the standpoint of the Fourth Amendment it will be observed that it did not compel the production of the papers, but it provided that if they were not produced they should be *conclusively deemed to be incriminatory.* If this was, in effect, a search under the Fourth Amendment it was unreasonable, because it compelled the witness *to confess the crime*—a very different thing from giving evidence which *might* incriminate.

Another effect of Justice BRADLEY'S language is not to be overlooked. He distinctly holds that the effect of what was done under the statute in question was an unlawful search and seizure which was not " substantially different from compelling him to be a witness against himself." This amounts to holding that evidence may be excluded because it has been obtained or discovered in an illegal manner, irrespective of the question whether it will incriminate the witness from whom it has been obtained. But before the decision in the *Boyd* case the rule had been uniformly held to be the other way, viz. : that the only question upon the production of documents in Court is whether they are admissible as evidence, (see *Wigmore on Evidence,* § 2183, and authorities cited in Note 1 on page 2956 ; also pp. 3126 and 3127 ; *Green-*

*leaf on Evidence (supra)*, 16th Ed., § 254*a*) and this Court has so held since the *Boyd* case was decided in *Adams vs. New York*, 192 U. S., 585.

It seems plain from these considerations that Justice BRADLEY's remarks about the Fourth and Fifth Amendments "running into each other" were unnecessary to the case in hand and they are not an accurate interpretation of the Fourth Amendment in its application to facts like those in the case at bar. However far the Court may go in applying the general language of the prevailing opinion in the *Boyd* case to particular cases that may arise, it is quite clear that in the *Baird* case the Court has placed a distinct limitation upon its application by holding that the compulsory production of documents under a subpœna *duces tecum* by a witness who is granted immunity from incrimination by such documents presents no feature of a search or seizure.

In the *Baird* case subpœnas *duces tecum* were served upon a number of companies, parties to the proceeding requiring them to produce all contracts for the purchase and transportation of anthracite coal entered into by each of the companies respectively during a period of over two years with "any producers of "anthracite coal or owners or operators of anthracite coal "mines." In some cases companies not parties to the proceeding had made the contracts. Original vouchers were also demanded from the companies for the months of April and May, 1901, April and May, 1902, and January and February, 1903, showing transactions for the purchase and transportation of coal bought from five independent companies. The objection was set up in the several answers in the proceeding brought by the Interstate Commerce Commission that the demand of the subpœna *duces tecum* was *in direct violation of the provisions of the Fourth Amendment of the Constitution* and "in derogation of the rights of" the witness and "*of the* "*corporation of which he is an officer to have its private books* "*and private affairs as a merchant protected from unreasonable* "*search and seizure*" (Record, pp. 117, 218, 228).

Yet the Court said that "*testimony given under such cir-* "*cumstances presents scarcely a suggestion of an unreasonable* "*search and seizure.*"

It will be observed that no weight was given to the fact

that the books and papers called for were the property of the corporations of which the witnesses were officers, *even though the proceeding would in all probability have resulted in the incrimination of those corporations.* But the Court held that the compulsory production of documents in the custody of an individual who was himself entitled to immunity from criminal prosecution was not an unreasonable search and seizure of the property either (1) of the witness himself, (2) of the corporation of which he was an officer, or (3) of third persons who were not parties to the proceeding. This decision is a conclusive authority in our favor upon this point.

2. *Unreasonableness under the Fourth Amendment cannot be predicated upon either the indefiniteness of the description of the books and papers called for in the subpœna or upon the volume of evidence and the inconvenience in producing it.*

The law applying to the obligations of witnesses requires only such certainty as is practicable in describing papers required to be produced under a subpœna *duces tecum.* This, however, is a rule of practice and varies according to circumstances and the character of the papers asked for; it has never been supposed to have any relation to the rights of persons under the Fourth Amendment. It is simply a rule of convenience for the witness so that he may be furnished with all practicable means of identifying the papers asked for. The demand of a greater number of papers than is reasonable is matter for the consideration of the Court below. If the power of the Court is used oppressively that is an error to be corrected in the usual way. But that the Court is governed by the restrictions of the Fourth Amendment in determining whether the demand of a subpœna is too indefinite, or too sweeping, or too oppressive in some other way, has never been supposed. An intimation *obiter* in *ex parte Brown* is the only expression of any Court to that effect that we have found; and it is contrary to the general trend of the authorities.

In *United States vs. Babcock*, 3 Dillon, 567, it was contended that subpœna *duces tecum* did not sufficiently identify certain telegraphic messages and therefore required the com-

pany *to make a search for them.* But Judge DILLON said that this objection was made without a proper view " of the functions of the writ."

He continued :

> " It is very easy, if Mr. Orton or the Company is " not in possession of the papers, for them to come here " and say ' we have no such papers.' That excuses " them to the Court, if the Court is satisfied that such " is the fact. But some degree of certainty is undoubt- " edly required in undertaking to specify the papers " and we have looked through books which have been re- " ferred to by counsel and others and we find the law in " practice quite well settled. It is this : The papers " are required to be stated or specified only with that " degree of certainty which is practicable considering " all the circumstances of the case, so that the witness " may be able to know what is wanted of him, and to " have the papers on the trial so that they can be used " if the Court shall then determine that they are com- " petent and relevant evidence. There is no specific " statute of the United States upon the subject. The " Fifteenth section of the Judiciary Act refers alone to " civil cases at common law."

The Court, also, says that the fact that the writ compels Mr. Orton *to make search* for the messages is not important.

*In re Storror*, 63 Fed. Rep., 564, there was a general investigation by the Grand Jury into a strike. A subpœna was issued for the production of telegrams. The Court ordered their production and distinguishes a subpœna issued in a civil case and a subpœna issued in a grand jury case, saying,

> " There is no question but that in many particulars " they are very similar. But the state court, in com- " menting upon the former subpœna, said that it ' was " an evident search after testimony ;' that is to say, " that it called for an indiscriminate search among the " papers in the possession of the witness,—for no " particular paper, but for some possible message, or " communication that might throw some light on some

" issue involved in the trial of a civil case. This is a " very different affair from an examination before a " grand jury, involving an original inquiry into the con- " duct of parties with respect to criminal acts, where " the telegraphic messages were probably the effective " means of carrying out their unlawful purposes. The " subpœna now under consideration calls for the pro- " duction of telegrams, describing them with such par- " ticularity as appears to be practicable ; and, under all " the circumstances, I think they are sufficiently de- " scribed, to indicate, to an ordinarily intelligent person, " the particular communications required."

See also

*Wigmore on Evidence*, § 2193.
*United States vs. Tilden*, 10 Ben., 566, 578.
*In re Mitchell*, 12 Abb. Pr., 249.

Counsel below referred to a note in Cooley on Constitutional Limitations, in which that author expressed the opinion that a process compelling the production of a man's private correspondence or seizing it in the mails was an unreasonable seizure under the Constitution, and closing with the words— " but no American officer or body possesses such authority and " its usurpation should not be tolerated." This only expresses the view of the author and is contrary to the general trend of authorities. It was expressly disapproved in *In re Storror*, *supra*, where the Court said: " But the courts have cer- " tainly not adopted this view of the law and legislation has " not been in that direction."

The *Baird* case itself is an authority for us on this point, for there the subpœnas were of an unusually searching character. We do not stop to make an analysis of the subpœna in that case to compare it with the subpœna in the case at bar. The record does not disclose in either case how many papers the subpœna would, if obeyed, have produced. But whether in the *Baird* case the original vouchers which evidenced the transactions with five independent companies for six months and the contracts for purchase and transportation of coal during a period of over two years with producers and owners and operators of mines, involved a greater or less scrutiny of the affairs of the companies than was involved in

the demands of the *Hale* subpœna, certainly the difference was only one of degree and cannot affect the principle by which the legality of such a process of the Court must be determined.

The general purpose of the subpœna herein was evident. It was to get information as to agreements : and after the hearing of May 2d, the petitioner was fully aware of the purpose of the examination and the kind of papers required. Moreover, he knew enough about the matter to object on the ground that the evidence called for would tend to criminate him under the Anti-Trust Law. If his objection was based on his inability to identify the papers, he should so have stated. Such an objection could, perhaps, have been obviated by further description ; or the witness could have examined in order to discover what papers were needed. These are matters of mere practice in the court below (*United States vs. Tilen*, 10 Ben., 566, 579 ; *Chaplin vs. Briscoe*, 13 Miss., 198).

*3. The petitioner was bound to produce the documents called for by the subpœna. Whatever his excuse, his failure to do so constitutes contempt.*

It was not for the witness to determine whether the description of the papers was sufficiently definite or the papers themselves material to the inquiry, or whether the production of such a volume of papers was oppressive. He was bound to comply, so far as it was possible, with the terms of the writ and produce the papers for the inspection of the Grand Jury and of the Court, submitting as he might be advised any objection to their use in evidence. (See note by John D. Lawson, 15 Fed. Rep., 723, where the subject is fully considered. See, also, *Doe vs. Kelly*, 4 Dowl., 273; *Key vs. Russell*, 7 Dowl., 693 ; *Amey vs. Long*, 9 East, 483 ; *Holtz vs. Schmidt*, 2 Jones & Sp., 28 ; *Bull vs. Loveland*, 10 Pick., 9 ; *Chaplain vs. Briscoe*, 5 Sm. & M., 198 ; *Corsen vs. Dubois*, 1 Holt, 239 ; *Field vs. Beaumont*, 1 Swanst., 209 ; *Mitchell's Case*, 12 Abb. Pr., 249 ; *Doe vs. Clifford*, 2 C. & K., 448 ; *In re O'Toole*, 1 Tuck., 39). See also *Wigmore on Evidence*, Section 2200, at page 2979.

Upon the presentation of any excuse by the witness the Court would have made an appropriate order. If the witness

had objected that the subpœna was too indefinite in its description of the papers or too oppressive in the number required to be produced, the Court, as it did in *United States vs. Hunter*, 15 Fed. Rep., 712, could have quashed the subpœna with leave to the District Attorney to amend the process or could have made any other reasonable provision.

But the witness defied the writ and the order of the Court and, therefore, is in contempt.

*4. Certain reasons of public policy which should influence the Court to adopt the broadest possible rule of evidence in cases involving violation of the Anti-Trust Law.*

The remark of the Court in *Brown vs. Walker* that unless evidence of this kind can be elicited from witnesses, it will be impossible to enforce recent laws relating to Interstate Commerce applies to documentary evidence with even greater force than it does to oral testimony. Numerous decisions like the Addyston Pipe case, the Traffic cases, the Northern Securities case, the Beef Trust case and the Tile Trust case have denounced specific formal agreements as violations of Section I. of the Anti-Trust Law. It would not be strange if Trusts, seeking to evade the law, should, in view of these decisions, adopt a method other than that of making formal agreements. It is a matter of notoriety that this result is accomplished by some corporations through "statistical departments" out of which grow implied agreements; by instructions to agents given simultaneously by a number of corporations amounting to an agreement to maintain a price fixed; by so-called "gentlemen's agreements;" by agreements, the only evidence of which is a course of dealing or memoranda or correspondence, or perhaps, by other methods devised to evade a law which some believe to be based upon unwise economic theory.

The only evidence which is easily obtainable is that which relates to the *results* of illegal contracts or methods. The direct proof of the contracts themselves is generally in the possession of the officers of the corporations and the policy of the immunity legislation is to compel them to disclose it.

It may easily be seen that the pursuit of evidence of a violation of law is not a simple matter. The exact line of in-

quiry cannot be pointed out in advance. The exact documentary evidence which may be required cannot be specified. Indeed, an illegal contract or combination may only be proved by the production of hundreds, or even thousands, of letters and documents. To say that the Court will require a Grand Jury to limit the scope of its investigation or exactly specify each agreement or paper which it seeks to examine would be to paralyze the investigation.

The materiality of the testimony is the important thing. That cannot be determined until the evidence has been produced; and so far as the record before the Court shows, the documentary evidence called for in this case was very material to the investigation before the Grand Jury.

**THIRD. As to the Fifth Amendment of the Constitution.**

We suppose it will not be seriously contended that if the Immunity Act of February 25th, 1903, is applicable to a proceeding before a Grand Jury, it is broad enough to give absolute immunity from future prosecution on account of anything concerning which the appellant might have testified or produced evidence. That the act of February 25, 1903, is applicable to a proceeding before a grand jury, we shall show in another place; and, thus, the prohibition of the Fifth Amendment against compelling a person to be a witness against himself in a criminal case becomes inapplicable. Even if the appellant was justified in refusing to produce the books and papers called for, he should have answered the questions which were asked him. His refusal, as we point out above, after the Court directed him to do so was contempt of court, and, therefore, the order appealed from should be affirmed.

Two reasons, however, were urged below why the witness was not compellable to answer the questions, namely, (1) that as the act of February 25, 1903, does not specifically require a witness to testify to incriminating matters, "it should not be construed as imposing such requirement, but merely as intending to reward his voluntary admissions of wrongdoing with a grant of immunity when made in aid of matters in

which the Government is especially interested," and (2) that he was entitled to assert the privilege under the Fourth and Fifth Amendments in behalf of MacAndrews and Forbes Company, as he was an officer of that corporation.

The second of these reasons we deal with in our Brief on the appeal in the case of *McAlister vs. Henkel* to be argued at same time with this appeal. As to the first reason we submit the following considerations :

Every person subject to the jurisdiction of a competent and lawful tribunal is bound to give testimony. This is a "solemn and important duty that every citizen owes to his country" *( Ward vs. State, supra).* He is privileged to decline only in case his answers may tend to criminate him. Our system of jurisprudence does not permit a witness to refuse to answer because he prefers not to or even because his answer will tend to degrade him, except, only, where degrading testimony is interposed solely to affect his credibility (1 Greenl. on Ev. Secs. 454, 455). Where the reason of the privilege ceases the privilege also ceases (Broom's Legal Maxims, p. 654). This is illustrated in several cases mentioned by Mr. Justice BROWN in *Brown vs. Walker*, as where the liability of the witness to penalty or forfeiture has been barred by the Statute of Limitations, or where he elects to waive his privilege or where he has received a pardon (161 U. S., 597–599). The witness is compellable to answer because "he stands with respect to "such offence as if it had never been committed." Quoting with approval the rule laid down in the Counselman case, Mr. Justice BROWN said, "that, if the statute does afford such im- "munity against future prosecution, the witness will be com- "pellable to answer."

In *Warner vs. State*, 81 Tenn., 52, a statute of Tennessee exempting witnesses from prosecution for offenses against the election laws was construed as merely offering a reward to a witness for waiving his constitutional privilege and not as compelling him to answer. But in *Brown vs Walker* the Supreme Court disapproved such a view of the statute, saying (p. 604) :

> "But, for the reasons already given, we think that "the witness cannot properly be said to give evidence "against himself, unless such evidence may in some

> " proceeding be used against him, or unless he may be
> " subjected to a prosecution for transaction concerning
> " which he testifies."

It is evident from the opinion of the Court that if they had been of the opinion that immunity was furnished under Section 860 of the Revised Statutes, the omission from that section of an express compulsion of testimony would not have been regarded as important.

Judge BUFFINGTON said, in deciding *Brown vs. Walker* below (70 Fed. Rep., 49):

> " The act of testifying has, so far as he is concerned,
> " wiped out the crime. It has excepted him from the
> " operation of the law, and, as to him, that which in
> " others is a crime has been expunged from the statute
> " books. If, then, there exists, as to him, no crime,
> " there can be no self-crimination in any testi-
> " mony he gives, and if there can be no self-crimination,
> " if neither conviction, judgment, nor sentence can di-
> " rectly or indirectly result from his testimony, what
> " need has he for the constitutional provision? "

The primary purpose of the immunity act was to enable the Government to secure evidence which had not theretofore been available in order the more effectually to enforce the Anti-Trust Law. To construe that law as merely offering a reward to guilty officers of corporations if they chose to avail of it would effectually defeat the purpose of the law, for no officer would ever elect to testify.

**FOURTH. The protection of the Fourth and Fifth Amendments is based alone upon the personal privilege of the witness. The objections urged by the witness cannot be relied upon for the benefit of the corporation of which he is an officer.**

For a discussion of this point we respectfully refer the Court to the First Point in the brief in *McAlister vs. Henkel.*

**FIFTH. The proceeding before the Grand Jury was a "proceeding, suit or prosecution" within the meaning of the immunity provision contained in the legislative, executive and judicial appropriation act approved February 25th, 1903.**

The Act of February 25th, 1903 (32 Stats., 903), provides as follows:

> "That for the enforcement of the provisions of the "Act entitled 'An Act to regulate commerce,' approved "February fourth, eighteen hundred and eighty-seven, "and all Acts amendatory thereof or supplemental "thereto, and of the Act entitled 'An Act to protect "trade and commerce against unlawful restraints and "monopolies,' approved July second, eighteen hundred "and ninety, and all Acts amendatory thereof or sup-"plemental thereto, and sections seventy-three, seventy-"four, seventy-five and seventy-six of the Act entitled "'An Act to reduce taxation, to provide revenue for "the Government, and other purposes,' approved August "twenty-seventh, eighteen hundred and ninety-four, the "sum of five hundred thousand dollars, to be immedi-"ately available, is hereby appropriated, out of any "money in the Treasury not heretofore appropriated, "to be expended under the direction of the Attorney-"General in the employment of special counsel and "agents of the Department of Justice to conduct pro-"ceedings, suits and prosecutions under said Acts in "the courts of the United States; *Provided*, That no "person shall be prosecuted or be subjected to any pen-"alty or forfeiture for or on account of any transaction, "matter, or thing concerning which he may testify or "produce evidence, documentary or otherwise, in any "proceeding, suit, or prosecution under said Acts: *Pro-"vided further*, That no person so testifying shall be "exempt from prosecution or punishment for perjury "committed in so testifying."

Counsel for the petitioner contends (1) that a proceeding before a Grand Jury is not such a " proceeding, suit or prosecution " under the Anti-Trust Act as is contemplated by the Act of February 25th, 1903, and (2) that it does not sufficiently appear from the record that the proceedings were taken under that Act so that in case of a future prosecution of the appellant he could plead or prove the proceedings before the Grand Jury in order to secure immunity.

This point is not well taken, for the following reasons :

1. Sections 1 and 2 of the Anti-Trust Law, under which the appellant was informed that the investigation was proceeding, provide that any person violating their provisions " shall be deemed guilty of a misdemeanor and, on conviction " thereof, shall be punished by fine not exceeding Five thou- " sand dollars, or by imprisonment not exceeding one year, or " by both said punishments in the discretion of the Court." The statute thus creates a criminal offense. If it is not, within the meaning of the Fifth Amendment of the Constitution, an " infamous crime," at least it is a crime for the commission of which a person can be prosecuted only upon the indictment of the Grand Jury and trial by a petit jury ; and such proceedings must have been within the contemplation of Congress when it prescribed the penalties above-mentioned for a violation of the Act. How, in any sense of the word, they are to be excluded from what is meant by the terms " proceeding " or " prosecution " under the Act of February 25th, 1903, it is difficult to see.

In the first place, neither " proceeding " nor " prosecution " is an inapt word to describe what takes place before a Grand Jury when it is examining witnesses and procuring evidence upon the investigation of facts to determine whether they point to the commission of a crime. Certainly a proceeding is a popular term for such an investigation and it is equally apt as a technical term. Counsel will have difficulty in selecting any word which will more accurately denote the thing which a Grand Jury does. And " prosecution " is not an inaccurate word for the same thing, even though in codes of procedure a more restricted meaning may be given it.

In *United States vs. Reed*, and in the *Counselman* case, both cited above, use is made of the word " proceedings " to describe proceedings before the Grand Jury.

In *United States vs. Moore*, 11 Fed. Rep., 248, an indictment was found for a violation of the Act of July 13th, 1866, which provided for a stamp tax and imposed "certain fines, "penalties and forfeitures" to be "sued for and recovered, "where not otherwise provided, in the name of the United "States, in any proper form of action, or by any appropriate "form of proceedings, before any circuit or district court of "the United States for the district within which said fine, "penalty, or forfeiture may have been incurred."

An indictment was found under this provision of the statute and the defendant contended that that form of proceeding was not justified by the statute. The Court overruled this objection and held that an indictment was "an appropriate "mode of proceeding and quite as appropriate as an action of "debt." It was contended that the words "may be sued for" limited the action to a civil suit. The Court overruled this objection and held that a suit might mean a criminal prosecution, citing in support of this Webster, Bouvier and, also, Bacon (Vol. 3 Abr., p. 542), where it is said that "an indict-"ment is defined as an accusation at the suit of the King," and "that it is a prosecution at the suit of the King merely," and is "the King's suit."

The Court adds :

> "The words 'sued for and recovered,' in the statute, "mean the same as 'prosecuted for and recovered;' "and, taken in connection with the expressions 'any "form of action,' 'or by any appropriate proceedings,' "cannot be held to exclude a suit or prosecution by in-"dictment, as the proceeding must be in the name of "the United States."

The decision in the *Moore* case was followed by Judge Barr *United States vs. Craft*, 43 Fed. Rep., 374.

In *Hogan vs. State*, 30 Wisconsin, 428, it was held that where a Police Justice was given certain powers "in civil and "criminal proceedings," this extended to the "drawings of a "Grand Jury."

See, also,

*Bruner vs. Superior Court*, 92 Cal., 248.
*Matter of Tillery*, 43 Kansas, 192.

In *Yates vs. The Queen*, 14 Queen's Bench Division, page 648, it is said that the word "'proceeding' * * * is a "very different term and one much *wider* than criminal prose-"cution." It was there held that a proceedings by information for libel was a criminal proceeding, but that "that does "not make it a criminal prosecution."

In *Drumm vs. Cessnum*, 61 Kan., 467, it was held that a warrant of arrest issued against a person charged with a criminal offense is a "proceeding" within the meaning of a statute of Kansas.

In view of these decisions it would seem that there was little substance in the contention now so elaborately urged.

Counsel below referred to a restricted meaning given to the phrase "criminal proceedings" in *Post vs. U. S.*, 161 U. S., 583. But this Court in that case had under consideration the question of jurisdiction of the Court below under an Act "regulating the procedure in *criminal causes*" in which it was provided that "all criminal proceedings instituted for the *trial* of offenses" should be tried in a certain district. The statute obviously referred to trials of criminal proceedings *after* indictment, and the Court so found. But it attempted to give no general definition to the word "proceeding" and the case has no bearing upon the interpretation of the act of 1903.

Furthermore, the intent of the Indemnity Act becomes clearer when some recent decisions of this Court are considered.

Before the decision in the *Counselman* case (142 U. S., 547), it was supposed that Section 860 of the Revised Statutes of the United States was adequate to furnish immunity to witnesses called to testify in proceedings under the Commerce Acts. It was presumably with the Counselman decision in mind that Congress passed the Act of February 25, 1903, in order to remove the disability of the Government pointed out by the Court in that case, so that an effective method for enforcing the law might be furnished. Without the immunity to witnesses, the Court had said in the *Counselman* case, "the enforcement of the Interstate Commerce law or *other* "*analogous acts*, wherein it is for the interest of both parties to "conceal their misdoings, *would become impossible*, since it is "only from the mouths of those having knowledge of the in-"hibited contracts that the facts can be ascertained."

Can there be any doubt that Congress was attempting, by appropriating money, to enable the Attorney General to procure the enforcement of all the laws relating to interstate commerce? This was admitted by counsel for *Hale* below; and of similar acts in *Brown vs. Walker* the Court said "the act is "supposed to have been passed in view of the opinion of this "Court in *Counselman vs. Hitchcock*"; and again in the *Baird* case, "We cannot read these statutes without perceiving the "manifest purpose of Congress to facilitate the disposition "of cases brought under the direction of the Attorney-"General to enforce the provisions of the Anti-Trust and "Interstate Commerce Statutes." Will not this Court again say that it is indispensable to a successful enforcement of such laws that witnesses may be compelled to testify? But it would be very inadequate if such compulsion were not to exist in such an important proceeding as that before a Grand Jury. To hold that the words "proceeding" and "prosecution" would include a criminal prosecution *after* indictment found and not include a proceeding before a Grand Jury *leading to* an indictment would clearly defeat the obvious purpose of the legislation.

2. It sufficiently appears from the record that the proceedings of the Grand Jury were under the Anti-Trust Law. The witness was fully advised by the attorney for the Government, in the presence of the Grand Jury (fols. 22, 37), "that the proceeding then pending before the said Grand "Jury was a proceeding under the so-called 'Sherman Act,' "being 'An Act to protect trade and commerce against unlaw-"'ful restraints and monopolies,' 26 Statutes, 209, First "Supplement, U. S. Revised Statutes, 726, *et seq.*, and the Acts "amendatory thereof and supplementary thereto, and particu-"larly Chapter 755 of the Laws of 1903, approved February "25th, 1903; and he was then and there further advised that "under the last-named Act no person shall be prosecuted, or "subjected to any penalty or forfeiture for or on account "of, any transaction, matter or thing concerning which he "may testify, or produce evidence, in any proceeding, suit or "prosecution under the said Act—that is to say, under the "Sherman Act—under which the aforesaid proceeding was 'brought; provided, however, that no person so testifying

" shall be exempted from prosecution or punishment for per-
" jury committed in so testifying."

This statement was made in the presence of the Grand Jury. It must be assumed that it was made with the acquiescence of that body, if, indeed, the Assistant District Attorney is not for that purpose the representative of the Grand Jury. Surely the witness himself cannot complain that he was not advised as to what the Grand Jury supposed to be the nature of the proceeding; and if the question ever arose upon a criminal prosecution of the witness on account of his testimony the fact that the proceeding was under the Anti-Trust Law would be provable and indisputable.

**SIXTH. The order of the court compelling the witness to answer is not a violation of the Tenth Amendment of the Constitution. It does not encroach upon the power of the States " to prosecute and punish offenders against their own peace and dignity," and " to grant and withhold pardons and to provide for and deal with the granting or withholding thereof, in accordance with their own Constitutions and laws."**

The Tenth Amendment provides as follows :

> " The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

While this point was not expressly decided in *Brown vs. Walker*, its decision was necessarily involved. The immunity of the statute under consideration in that case was not materially different from that contained in the Act of February 25, 1903. It was contended by the plaintiff in error in that case that he did not secure immunity from prosecution in a State Court on account of any answer which he might make. But the Court held that while he would not be entitled in a State Court to exemption under the Fifth Amendment, as that was intended only as a restriction on Federal power, the

act of Congress was not subject to the same limitation but was under the Sixth Article of the Constitution "the supreme Law of the land" (*Stewart vs. Kahn*, 11 Wall., 493, and some other cases are cited). And with reference to the immunity clause under consideration, the Court said (p. 608), "that the immunity is general, and to be applicable whenever and in whatever Court such prosecution may be had" (see, also, *Jack vs. State of Kansas*, decided at this term of the Court).

Neither in the Interstate Commerce Law under consideration in *Brown vs. Walker*, nor in the Anti-Trust Law involved in the case at bar, was Congress dealing, as an independent matter, with a rule of evidence intended to be of general application. In both cases Congress was acting under Article I., Section VII., Clause 3 of the Constitution expressly reserving to it the power "to regulate commerce * * * among the several states * * *." And it was entirely competent for it to prescribe rules of evidence if it deemed them necessary to the effective exercise of its unquestioned power. And that it was necessary was the opinion of the Supreme Court, for in the opinion in *Brown vs. Walker* it is said, "If, as was justly observed in the opinion of the Court below, witnesses standing in Brown's position were at liberty to set up an immunity from testifying, the enforcement of the Interstate Commerce Law *or other analogous acts*, wherein it is for the interest of both parties to conceal their misdoings, would become impossible, since it is only from the mouths of those having knowledge of the inhibited contracts that the facts can be ascertained."

These exemption clauses cannot, therefore, reasonably be regarded in any other light than as incidental to the exercise of a power expressly reserved to the general government, and as such must be sustained as constitutional (Art. 1, § 8, Ch. 18, of the Constitution). It hardly seems necessary to cite authority upon such a plain proposition, but the following cases may be referred to:

*Hepburn vs. Griswold*, 6 Wall., 603.
*Legal Tender Cases*, 12 Wall., 457.
*In re Jackson*, 14 Blatchf., 251.
*Prigg vs. State of Pennsylvania*, 16 Pet., 618.
*McCulloch vs. State of Maryland*, 4 Wheat., 316.
See, also, 2 *Story on Constitution*, §§ 1245, 1247, 1248, 1250, 1252-1254.

It is significant that these points were not urged upon the Court in *Brown vs. Walker*. Mr. Carter in the latter case did not even suggest them. The points would apply with equal strength to any *effective* exemption clause, and if sustained would render the enforcement of all such laws as the Interstate Commerce Law and the Anti-Trust Law practically impossible.

**SEVENTH. The exemption contained in the Act of February 25, 1903, was not in effect an attempt to exercise the pardoning power, or a violation of Article II., Section II., Cl. 1, of the Constitution.**

That clause provides as follows:

> "The President * * * shall have power to grant "reprieves and pardons for offenses against the United "States, except in cases of impeachment."

The precise point now raised by the petitioner was urged in *Brown vs. Walker* and decided adversely to his contention (161 U. S., p. 601).

While it has been held that Congress has no power to limit the pardoning power of the President in any way (*Ex parte Garland*, 4 Wall., 380; *U. S. vs. Klein*, 13 Wall., 128, 141), it has never been held that Congress may not itself in legislation of the kind under consideration here conditionally exempt persons from the penal provisions of its own enactments. As Mr. Justice Brown pointed out in *Brown vs. Walker*, a law with such an exemption from its penalties extended to persons mentioned therein belongs to a class of legislation common in England and usually dealt with by Parliament, especially in cases where a large number of implicated witnesses are needed (see *Taylor on Evidence*, Sec. 1455 and note) as in parliamentary inquiries or in prosecutions for gaming, riot, conspiracy, violation of the election laws or other such offenses. Such legislation is familiar in this country in the case of bribery and gambling. There is no decision in this country that such exercise of the legislative power is excluded

by the provision of the Constitution conferring upon the President the pardoning power.

The power of the President is generally exercised with reference to acts already committed. In every case where amnesty or pardon has been exercised by act of the legislature it has been in relation to future acts. While the acts passed after the War of the Rebellion in some cases purported to deal with cases where violations of law had been theretofore committed, it is doubtful whether they constituted more than "a suggestion of pardon * * * rather than "authority" and "an expression of the legislative disposi- "tion to carry into effect the clemency of the Executive," as such acts were characterized in *United States vs. Klein*, 13 Wall., 139, 141. In that case it was also held that amnesty extended by proclamation of the President pursuant to such "suggestion" or "expression" was not affected by the repeal of the act of Congress purporting to authorize it.

Where legislative acts of amnesty or pardon have related to past offenses, they have either dealt with cases of attainder where it was necessary that Parliament should act, or been cases where the legislature has sought to investigate or render effective the performance of the legislative function. If, for instance, to render the execution of an act effective, it was necessary, as in this case, to establish new rules of evidence, the legislature did so. And in most cases such as we have referred to above the legislature has endeavored to make the operation of penal statutes effective by withholding the penalty of the statute from those offenders who were willing to aid in the execution of the law. In a correct view this is not the pardoning power at all.

The point now urged has arisen very infrequently, although Congress has very often passed laws granting remission of fines and exemption from penalties. This is no doubt due to the well recognized limitations upon the exclusiveness of the Executive power. As early as 1825 in *United States vs. Morris*, 10 Wheat., 246, the principle was not denied by the party challenging an act of Congress. In *The Laura*, *supra*, decided in 1884, it was said that "the Court and the eminent "counsel who appeared in that case accepted it as a propo- "sition not open to discussion." And it was not until Mr. Carter raised the point in *Brown vs. Walker* that the Court

was again called upon to consider it and disposed of it somewhat summarily.

Another view of the matter is worth consideration.

If a pardon from the President be necessary in addition to the act of Congress, it was in effect granted when the President signed the Act of February 25, 1903. No particular form of pardon is necessary. In *U. S. vs. Klein, supra*, the act of Congress purporting to authorize the President to grant amnesty and pardon to certain persons was referred to as an "expression of the legislative disposition to carry into "effect the clemency of the Executive," although it was also held that the power of the President to exercise the pardoning power after the act of Congress was repealed was not affected. So here the act of the President in giving his approval to the act in question was an expression of the Executive approval of the act of clemency sought to be put into effect by Congress. If he had not approved of it, presumably he would have vetoed it.

**EIGHTH. Even if the Court should find that the appellant was not bound to produce the papers asked for in the subpœna duces tecum, he is in contempt for his refusal to answer the oral questions.**

At the hearing before the Grand Jury the witness was first asked a number of questions. Afterwards he was asked to produce the papers mentioned in the *subpœna duces tecum*. He declined both to answer the questions and to produce the papers. He is clearly in contempt for not answering the oral questions.

**FINALLY. The order of June 10th, 1905, should be affirmed.**

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